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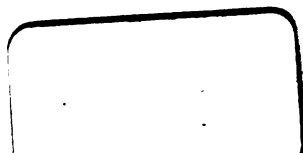
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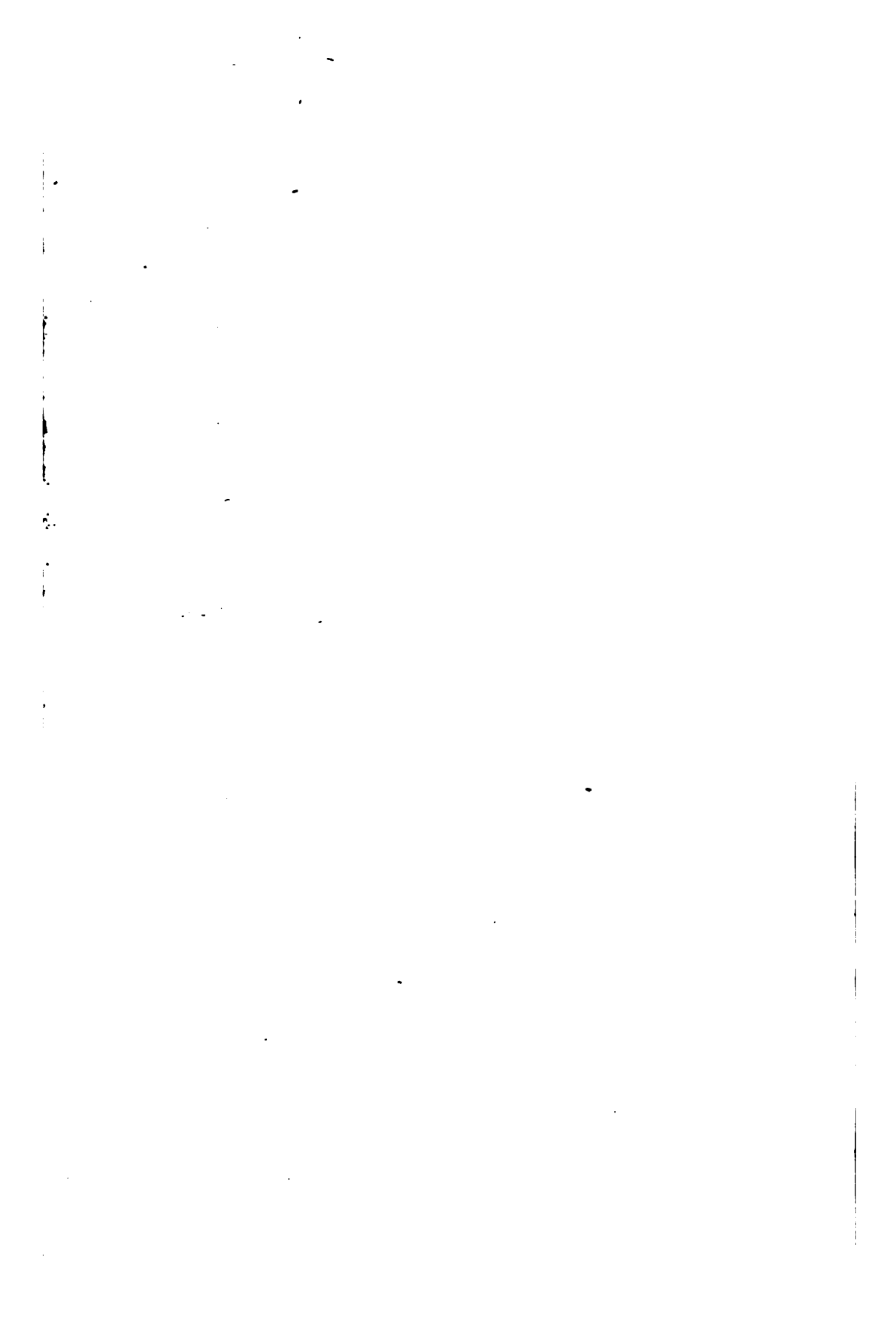
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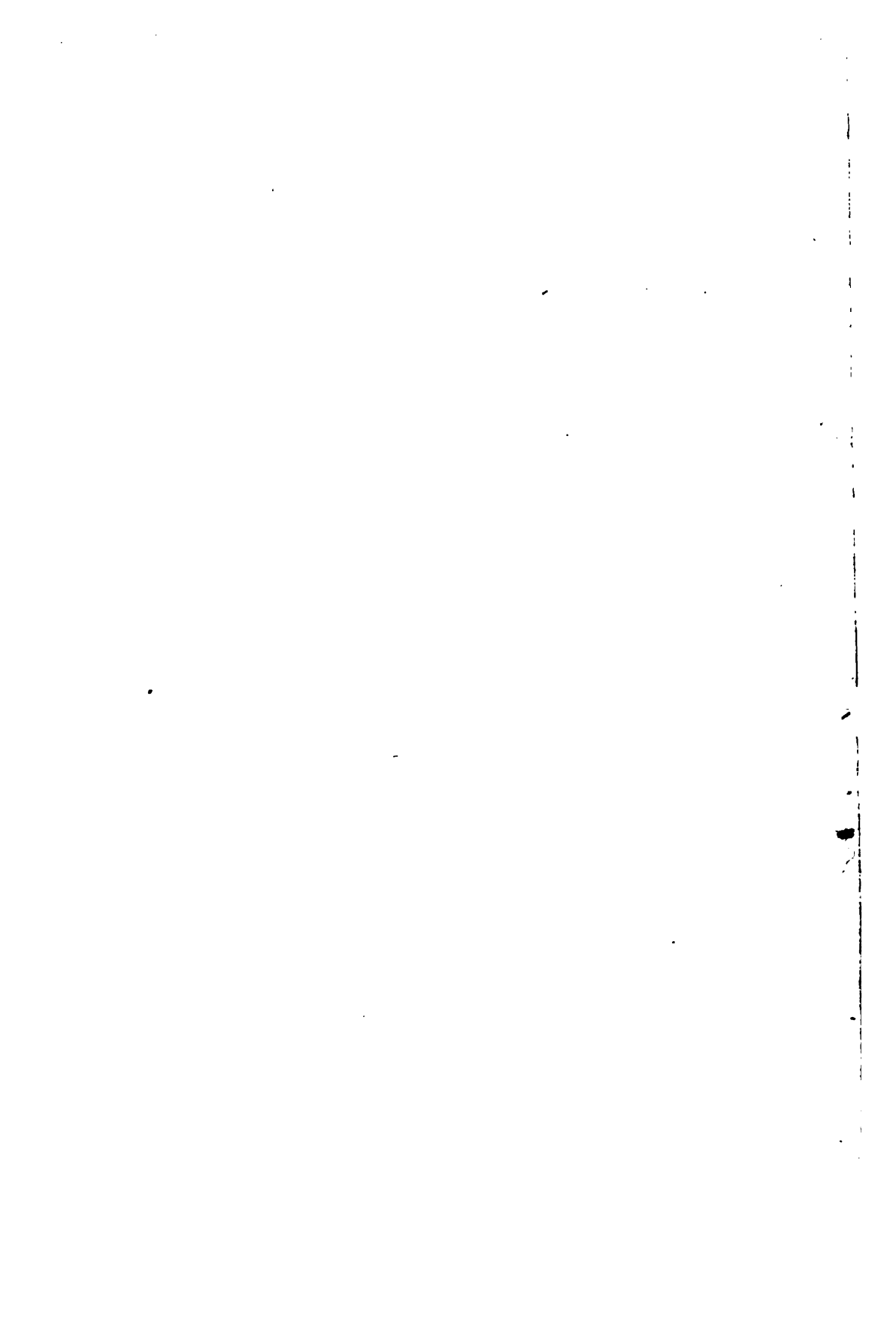


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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

JANUARY TERM, 1915

BY
U. G. WHITNEY
REPORTER

VOLUME 169

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MAR 27 1916

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SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

FRANK R. GAYNOR, Plymouth County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

OFFICERS OF THE COURT.

GEORGE COSSON, *Attorney General*, Audubon County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

DISTRICT COURTS.

- First District*, two judges—HENRY BANK, JR., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Orawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Orawa (1915); W. G. SEARS, Sioux City (1915).
- Fifth District*, three judges—J. H. APPLGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILLCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HOKAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYERS, Des Moines; HERBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. LEE, Ames; † C. E. ALBROOK, Eldora; H. E. FRY, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—PAUL G. NORRIS.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—JOHN R. BANE.
- Perry*—W. W. CARDELL.
- Shenandoah*—GEO. H. CASTLE.

* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, JANUARY, 1915, TERM,
AND IN THE SIXTY-NINTH YEAR OF THE STATE.

J. L. DAUS, Appellant v. WM. H. SHORT, Appellee.

PRINCIPAL AND AGENT: Authority of Agent to Employ—Employ-
1 ment of Agent's Minor Son—Validity. An agent, authorized by
his principal to employ necessary help, may not employ his own
minor son. "Loyalty to his trust, the first duty of the agent," is
a rule of law so inflexible that he will not be permitted to do that
which may even tempt him to do wrong.

APPEAL AND ERROR: Appeal from Motion to Strike—Bill of Ex-
2 ceptions. No bill of exceptions is necessary on an appeal from an
order striking certain matter from the petition, no evidence having
been taken.

APPEAL AND ERROR: When Appeal Lies—Motion to Strike—Bill
3 of Exceptions. An appeal lies from an order striking from the
petition allegations wherein recovery is sought on certain items.

VOL. 169 IA.—1

Appeal from Woodbury District Court.—HON. DAVID MOULD,
Judge.

FRIDAY, FEBRUARY 12, 1915.

ACTION by plaintiff to recover for services of his minor sons, and for other items. There was a motion to strike that part of the petition by which plaintiff sought to recover for such services. The motion was sustained, and the plaintiff appeals.—*Affirmed.*

George W. Kephart and P. H. Konzen, for appellant.

Griffin & Page, for appellee.

PRESTON, J.—Plaintiff was employed by the defendant to manage defendant's farm in Woodbury County, Iowa. The petition alleges that the verbal contract for the employment of plaintiff's two minor sons was made between himself and sons under a general verbal authority given by defendant to plaintiff to employ whatever help was necessary to properly carry on the operations of defendant's farm; the petition further alleges that the labor was performed by his said two sons during the years 1907 to 1910, and that they did work for defendant in the sum of \$331.25.

The grounds of defendant's motion to strike were that: The petition and the amendments thereto contain the allegations that during all of the times for which plaintiff claims compensation from defendant for labor performed by the minor sons of plaintiff, the plaintiff herein was the agent of defendant and was employed to act in the interests of the defendant, who was his principal, and that in the alleged employment of the two minor sons of plaintiff, the plaintiff himself being entitled to any compensation which defendant might have to pay for their services, he was necessarily acting

1. PRINCIPAL AND AGENT: authority of agent to employ: employment of agent's minor son: validity.

for himself when his interests were adverse to the interests of his principal, and consequently he could make no valid contract which would bind his principal. The motion seems to have been treated as a demurrer.

The petition states that one son performed forty days labor in 1907, forty days in 1908, five months in 1909, and five months in 1910, and the other son, twelve days in 1909 and thirteen days in 1910; that there was no agreement as to the amount plaintiff should pay his sons, but that their services were worth the amount charged. The labor performed was ordinary farm labor, we take it from the statement of account. Counsel for appellant contend that the facts recited in the petition do not show that the interests of plaintiff and defendant were adverse, but they say, admitting for the sake of argument that they were adverse this does not relieve the defendant from the obligation of a contract which he authorized and from which he accepted and retained benefits; that by demurring to the petition defendant admits that the services were performed as alleged, and that the amount claimed is the reasonable value thereof. There is no allegation in the petition that defendant accepted the services or that he had any knowledge thereof or consented to the arrangement.

The services of the minor sons of plaintiff belonged to the plaintiff, and the effect of the contract between plaintiff and his sons to employ them for defendant is that plaintiff was contracting with himself, and this would be contrary to his duty to the defendant and would place the plaintiff in such a position as that his interests would be antagonistic to those of the defendant, his principal.

Counsel for appellant also contend that fraud will never be presumed, and that there is nothing in the pleadings to show that the interests of the parties were adverse to such an extent that the plaintiff could not make a binding contract for the employment of his minor sons, and that there is nothing in the pleadings to reflect upon the fairness and good faith of the contract. But the facts are stated by which it is

shown that plaintiff did employ his minor sons whose services belonged to him.

For appellee, it is contended that where an agent enters into a contract in which his interests are antagonistic to those of his principal, it is not necessary to show that an improper advantage was taken or that there was actual fraud. The law does not presume that such transactions will always be impressed with fraud, but they furnish an inducement to fraud, and afford to persons who should always act with the most conscientious and scrupulous good faith opportunities to abuse their trust; that a total disability is therefore enjoined to take away all temptation, and the transaction will be set aside without inquiry as to its fairness. In support of their contention, they cite: *Iron Co. v. Kirkpatrick*, 92 Mich. 252; *New York Central Ins. Co. v. National Ins. Co.*, 14 N. Y. 85, 91; *Sturdevant v. Pike*, 1 Ind. (Carter) 277; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Grumley v. Webb*, 100 Am. Dec. 304.

The rule as stated in the books is that loyalty to his trust is the first duty which the agent owes to his principal, and the agent may not put himself in relations antagonistic.

So careful is the law in guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself as agent the property of his principal, or the like. To repudiate them, the principal need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. And it makes no difference that the intention of the agent was honest and the result of his action might be to the advantage of his principal; the latter may still repudiate it. The tendency of such transactions is bad, and a good intention in a particular case will not save it, unless the prin-

cial sees fit to affirm it. The remedy of the principal in such a case is usually the repudiation of the transaction.

It does not appear in this case that defendant resided in Woodbury county, where the farm was situated, or even in the state, and, so far as appears from the record, the defendant repudiated the transaction when it was called to his attention by the bringing of this suit.

Appellee has filed a motion to dismiss the appeal because the abstract contains no judgment from which an appeal may be taken, and because the abstract is not signed, and some other like grounds.

No evidence was taken, so that no bill of exceptions was required. The abstract is brief, containing only the petition, motion for more specific statement, amendments, motion to strike, and notice of appeal. The ruling on such a motion is appealable. It fully determined the plaintiff's right to recover and precluded a recovery as to that part of his petition relating to the wages of his sons. Code Sec. 4101; *Hews v. Stonebraker*, 132 Iowa 608. The motion to dismiss is overruled.

For reasons given, the judgment is—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

HAVNER LAND COMPANY, Appellee, v. WALTER MACGREGOR, Appellant.

LIMITATION OF ACTIONS: Necessity to Plead—General Equitable

1 **Demurrer—Insufficiency.** A general equitable demurrer (that the facts stated do not entitle the plaintiff to the relief demanded) does not raise the question of the statute of limitation.

PLEADING: Fraud—Conclusion—Facts Stated. Fraud is a conclu-

2 sion from the facts stated.

PRINCIPLE APPLIED: A petition clearly pleads fraud which alleges: That defendant was orally employed by plaintiff as agent to buy a tract of land for plaintiff; that defendant agreed to purchase the land for plaintiff; that plaintiff instructed defendant to accept a certain proposition and that plaintiff would furnish the money; that defendant entered into contract for the purchase *in his own name* and claimed to own the property.

SPECIFIC PERFORMANCE: Statute of Fraud—Trusts—Construction of Pleading.

- 3 No claim for "specific performance of an oral contract for the creation and transfer of an interest in land," in violation of Sec. 4625, Par. 4, of the Code, nor an attempt to establish an express trust by oral evidence, in violation of Sec. 2918 of the Code, is presented by a pleading alleging that defendant entered into a written contract in his own name for the purchase of lands and thereunder claimed all interest in said land, in violation of an agreed oral contract of agency between plaintiff and defendant by which defendant agreed, for a stipulated consideration, to buy said lands for plaintiff and on terms which plaintiff had directed defendant to accept, followed by a prayer that defendant be enjoined from transferring his seeming interest in said contract and be compelled to assign the same to plaintiff.

TRUSTS: Resulting Trusts—Purchase by Agent—Purchase Price.

- 3 A "resulting trust" in lands may be established by reason of the fraud of defendant in taking a contract for the purchase of lands in his own name, in violation of his agreement to buy the lands for plaintiff, even though plaintiff has paid no part of the purchase price, plaintiff having tendered to defendant the amount which he, defendant, had paid.

TRUSTS: Resulting Trusts—Express Agreement—Fraud. Reliance

- 4 on an express agreement is no obstacle to the establishment of a resulting trust, if the essential element of fraud is shown.

TRUSTS: Agent—Violation of Duty. An agent, taking the legal

- 5 title to property in his own name in violation of his fiduciary duty, will be treated, in equity, as a trustee of the property for his principal.

Appeal from Iowa District Court.—HON. R. P. HOWELL,
Judge.

WEDNESDAY, NOVEMBER 25, 1914.

REHEARING DENIED FRIDAY, FEBRUARY 12, 1915.

ACTION in equity. There was a demurrer to the petition, which was overruled, and the defendant elected to stand on his demurrer. Judgment and decree against defendant, and he appeals.—*Affirmed.*

J. M. Dower, for appellant.

E. G. Popham, for appellee.

PRESTON, J.—The substance of the allegations of the petition is, that defendant was an employee of plaintiff as its agent to purchase a tract of Canada land from one Ives, and that the agreed compensation or commission to the defendant as such agent was \$50.00; that defendant agreed to undertake the purchase for plaintiff; that Ives made a proposition to sell the land, stating the terms, and that plaintiff instructed defendant to accept the proposition and that plaintiff would furnish the money for the first payment of \$500.00. That, in conformity with the contract, as made by correspondence, a written contract was entered into, but in the name of defendant and Ives; that defendant paid \$500.00 and agreed to pay Ives the balance of the purchase price on or before five years; that the said proposal and the said contract, as entered into by the said defendant and Ives, in equity belonged to and are the property of this plaintiff, and the defendant has no right or interest therein; copies of the letters are attached to the petition. That plaintiff has tendered to defendant the \$500.00 paid on the contract, and the commission agreed upon; that defendant has refused and refuses to assign his interest in said property to the plaintiff, and claims to be the owner of said land through and by virtue of the purchase of said land from Ives; that defendant is without means or property, and plaintiff does not have a plain, speedy or adequate remedy at law. Plaintiff prays that defendant be enjoined from making an assignment of his interest in the contract, and that he be required to assign to plaintiff all his seeming interest therein, and that he be

restrained from carrying out, individually, the contract, except as he may do so under direction of plaintiff, and for such other and further relief as may be equitable.

The defendant demurred to the petition on three grounds, the last of which is not sufficiently specific.

1. LIMITATION OF ACTIONS: necessity to plead: general equitable demurrer: insufficiency. *American Baptist, etc., Society v. First Baptist Church*, 163 Iowa 609.

The other grounds are: (1) That the averments of plaintiff's petition show an agreement creating an interest in, and to transfer, real estate, which is not shown to be in writing, and is contrary to the statute of frauds; (2) The averments of the petition show the creation of an express trust which is not shown to be in writing, and is contrary to the statute in relation to trusts.

The demurrer was overruled and exception taken January 16, 1913. No further proceedings were had in the case until January 22, 1913, when it was entered of record that defendant elected to stand upon his demurrer. April 5, 1913, judgment and decree was entered against defendant, in which it is again recited that defendant elected to stand upon his pleading and refused to plead further. Default was entered for want of plea.

The decree finds that plaintiff is entitled to the benefits of the contract referred to and that the equities were with plaintiff; required an assignment of the contract to plaintiff and required plaintiff to pay defendant \$500.00 upon the making of the assignment; that the clerk should execute such assignment if defendant failed to do so; that by the decree and assignment all rights of defendant be transferred to the plaintiff.

The agency and fraud alleged are admitted by the demurrer. Appellant contends, and it cites as sustaining the point, *Hoon v. Hoon*, 126 Iowa 391, that fraud cannot be pleaded in general terms, but the facts relied upon must

2. PLEADING: fraud: conclusion: facts stated. be stated. Defendant argues that no fraud is charged. The petition does not use the word "fraud,"—to do so and so plead generally would not be

sufficient; but the facts are stated, and such facts clearly constitute a fraud by defendant, as agent, upon plaintiff, his principal.

II. The contention of appellant may be best stated by giving his own language. He says, in substance, that declarations or creations of trust or powers in relation to real estate

8. SPECIFIC PERFORMANCE: statute of frauds: trusts: construction of pleading. must be executed in the same manner as deeds of conveyance, citing the statute, Sec. 2918; that there can be no resulting trust where an express agreement is relied upon, nor can an

express trust be established by parol (citing cases). That the petition not only seeks to create an interest in real estate, but, in addition to that, for a transfer thereof, and that the only thing asked for in the petition is specific performance, and that this can only be done by a deed of conveyance or an assignment of the contract for the transfer of the real estate between appellant and Ives, which would ordinarily put appellee in a position to demand a deed from Ives; that plaintiff's claim is based solely upon an alleged oral agreement; and that the question of a resulting or an express trust cannot enter into the issue raised upon this demurrer, because the trust, if any, is predicated upon an express agreement and, therefore, it would be an express trust and contrary to the language of the statute; and lastly, that the action is predicated upon an express oral agreement to enter into a contract by which plaintiff says appellant was to buy this land and then turned it over to them; that plaintiff has not paid any of the purchase money.

Counsel seem to misapprehend the petition. There is no claim for specific performance. Again, counsel say the contract was in parol. It is true the averments of the petition are that the employment of defendant by plaintiff by which defendant became plaintiff's agent was in parol, but the contract between Ives for the sale of the land was in writing, by written correspondence, by which Ives made the proposition, and the written acceptance thereof, for and on behalf of

plaintiff, and later the agreement was embodied into a formal written contract for the sale of the land by Ives, which defendant fraudulently took in his own name.

Again, it is not the claim of plaintiff as stated in the petition, as defendant contends, that there was an oral contract by which defendant was to buy the land and turn it over to plaintiff. Plaintiff contends that, because of the fraud by the breach of fiduciary duty, the case is not within the statute and that there is a resulting trust.

Counsel for appellee also state their claim in this way: That the question is, whether MacGregor can accept an agency to purchase real estate for the Havner Land Company from

Ives and, after the Havner Land Company
 4. Trusts: re-
 sulting trusts:
 purchase by
 agent: pur-
 chase price.
 had divulged to him all of the information which it possessed as to the desirability of the land and its value and the probable profits to the purchaser, and MacGregor, fraudulently and for the purpose of cheating and defrauding plaintiff, takes the title in himself, after he has accepted the trust and holds the land as against the land company, when MacGregor admits the agency and admits the trust, whether he can refuse to transfer after he has taken the title in himself.

It is argued for defendant that the plaintiff has not paid any of the purchase money. But it does appear that defendant has made the first payment thereon of \$500.00. We are cited to cases by appellee holding that, in some cases where a person who had agreed to buy land for another, bought in his own name and paid the purchase price, he will, nevertheless, be held a trustee for the other party and it will be held that he advanced the purchase money, if he does advance it, as a loan to the one for whose benefit the land was bought. *Jackson v. Stevens*, 108 Mass. 94; *McDonough v. O'Neill*, 113 Mass. 92; *Hellman v. Messmer*, 75 Cal. 166 (16 Pac. 766), 5 L. R. A. (N. S.) 112, and Note.

It does not appear whether defendant had yet obtained the title to the land. The final contract signed by defendant and Ives, as set out in the decree, provides that title is to

pass when final payment is made, which may be done in 1917, or at any time prior thereto. The petition alleges that defendant claims to be the owner of the land through and by virtue of the purchase thereof from Ives. But if he has not the title now, he was in position to obtain title under the contract and could do so now by paying the full purchase price, if it were not for this suit.

Defendant argues that there can be no resulting trust where an express agreement is relied upon, citing cases. But he ignores the question of fraud and confuses the agreement

5. TRUSTS: re-
sulting trusts:
express agree-
ment: fraud. between plaintiff and defendant by which the agency is created, and the agreement for the sale of the land itself by Ives, and we think

he misapprehends the allegations of the petition when he claims that he was to buy the land in his own name and turn it over to the plaintiff. It is not so alleged. Resulting trusts arise by operation of law because of fraud, which is an essential element.

Appellant cites *Newis v. Topfer*, 121 Iowa 433, where it was said, in substance, that the mere breach of an express promise or refusal on the part of an alleged trustee to execute the trust reposed in him, however reprehensible, will not be sufficient to remove the bar of the statute and allow a trust in realty to be established by parol evidence. But it was held in the same case that where fraud or deception enters into the transaction, a constructive trust arises, and equity will enforce a parol agreement for the protection of the innocent party, and it was held in that case that the facts were sufficient to create a trust because of the confidential relation existing between the parties.

Appellant also cites and seems to rely largely upon, *Burden v. Sheridan*, 36 Iowa 125; and *Flanders v. Booge*, 146 Iowa 675.

The instant case may be readily distinguished. In the *Burden* case, defendant denied the agency; the matter was tried out on the evidence, and the court, at page 136, held that:

"It is alleged that Sheridan made the agreement with plaintiff for the purpose of keeping the latter from competing with him for the purchase of the land and with the design of securing said land himself and upon better terms than he might otherwise be able to do. Now the pleadings and the proofs show that Sheridan purchased the property at the same price Burden alleges he was willing to give for it if he could get it for no less. The evidence, in our opinion, entirely fails to establish the fraud alleged or any fraud other than is always involved in the simple breach of a contract. It is but a naked repudiation of an alleged parol agreement. There being no fraud such as will take the case out of the statute, and the plaintiff having made no payment or advanced any part of the purchase money, the alleged trust being denied by the defendant, parol evidence is incompetent under the statute of frauds to prove it."

Under the statute of frauds, it is a question of proof of the admissibility of parol evidence to prove the contract. In the instant case, the contracts, the agency and the fraud are all admitted by the demurrer. The breach by an agent of a fiduciary duty which he owes to his principal is itself a fraud and more than a mere breach of contract.

The *Flanders* case was also tried out on the evidence. It was there claimed by the plaintiff that the son of defendant was to take title in the name of the son, and then that there was an agreement that the title was to be transferred from the son to the plaintiff, and there was no fraud perpetrated in the son's taking the title in his name.

In the case at bar the agreement was that MacGregor was to buy the land for plaintiff and take the title in the name of the plaintiff. In other words, the contract was to be made between the plaintiff and Ives; but MacGregor, while admitting the agency and fraud, after he may have secured all the information as to the value of the land and the advantageous sale which

6. TRUSTS:
agent: viola-
tion of duty.

plaintiff alleges could have been made, then in fraud of the rights of plaintiff took the title and for the purpose of securing the benefits of the transaction to himself, took the title to the land, not in the name of plaintiff, but in his own name. *Brookings Land & Trust Co. v. Bertness*, 96 N. W. 97 (S. D.), is a case very much like the case at bar in its facts. It is in point and we shall quote therefrom at some length. The court said:

"After assuming to act as the agent of the plaintiff in the purchase of the property with the amount of commission as such agent fixed, the taking of the property in his own name or the name of his wife, without the knowledge of the plaintiff, was clearly in violation of his fiduciary relations as such agent. . . . It seems to be a well settled rule in courts of equity that the plea of the statute of frauds can never be allowed to be used as an instrument of fraud. In other words, the statute of frauds is to prevent frauds and perjuries and not to protect frauds." Citing cases. And see *Halligan v. Frey*, 161 Iowa 185. Continuing, the court said in the *Brookings* case—quoting from a New York case:

" 'There are two principles upon which a court of equity acts in cases, and its remedial jurisdiction which taken together, in our opinion, entitle the plaintiff to maintain this action. One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other that, when a person, through the influence of a confidential relation, acquires title to property or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. The principle that, when one uses a confidential relation to acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee and compel him to restore what he has unjustly acquired or seeks to unjustly retain, has frequently been applied to transactions within the statute of frauds.' " (Citing cases.)

The *Brookings* case also quotes the following from *Rose v. Hayden*, 35 Kans. 106:

“ ‘The controlling question in this case is not whether the principal advanced the purchase money or not, but it is whether in equity and good conscience the agent, who in fact purchased the property with his own money, in his own name, in violation of his agreement with his principal, and in the abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot. (Citing cases.) The facts that the defendant was the agent of the plaintiff for the purpose of negotiating for the purchase of the property, that in violation of his agency he purchased the property for himself and took the title thereto in his own name, and the further facts that the plaintiff has elected to treat the defendant as a trustee holding the property for the plaintiff, and has tendered to the defendant the full amount which the defendant paid for the property and an additional amount sufficient to compensate the defendant for all his services as agent, are, we think, sufficient to entitle the plaintiff to recover.’ ”

See also *Trice v. Comstock*, 121 Fed. 620, 61 L. R. A. 176; 2 *Pomeroy's Equity*, Sec. 959.

The above cases hold that if the agent takes the legal title to property in violation of his fiduciary duty, equity will treat him as a trustee thereof for his principal. Many other cases are cited by appellee to substantially the same effect.

Without further discussion, we are of opinion that the trial court did not err in overruling the demurrer. Having disposed of the case on the merits, it is unnecessary to consider appellee's motion to dismiss, except to say that it is not well taken and is, therefore, overruled.

The decree of the district court is—*Affirmed*.

LADD, C. J., EVANS and WEAVER, JJ., concur.

In the Matter of the Estate of MARY A. LESTER, Deceased.

EXECUTORS AND ADMINISTRATORS: Funeral Expenses—What

1 **Constitutes—"Monuments"—Nursing—Preferences.** A monument is not strictly a "funeral expense" within the meaning of Sec. 3347, Code. A claim for "nursing" deceased during the last sickness, under the same section, is to be preferred to a claim for a monument. Therefore, the court in an insolvent estate properly ordered the payment of a claim for nursing before permitting an expenditure for a monument.

Appeal from Wapello District Court.—HON. F. M. HUNTER, Judge.

FRIDAY, FEBRUARY 12, 1915.

THIS is a proceeding in probate for an order authorizing the administrator to expend \$125.00 for a monument for deceased. The court granted the order for a monument in the sum of not to exceed \$100.00, but provided that before expending said amount for that purpose the administrator should first pay all funeral expenses and the expenses of the last sickness of the deceased, which should include the sum of \$156.00 of the \$363.00 claim allowed by the court in favor of Rachel Mead, so far as the administrator has assets in his hands. The administrator, E. M. Lester, appeals.—*Affirmed.*

Tisdale & Heindel, for appellant.

Steck & Steck, for Objector, Rachel Mead, appellee.

PRESTON, J.—Appellant is the son and only heir at law and the sole beneficiary under the will of deceased. The show-

ing is that the assets consist of \$280.00 in money and a small amount of household goods; that the indebtedness against the estate and admitted claims amount to about \$140.00; but that in addition to such claims is the claim of Rachel Mead, which was allowed in the sum of \$363.00; \$156.00 of the Rachel Mead claim was for nursing the deceased, as we understand the record, and we do not understand appellant to dispute that fact. The objector, Rachel Mead, filed written objections to the granting of the order because the administrator is the son of decedent and had received from his mother, the deceased, all the real estate she owned, of the value of from \$1,000.00 to \$1,200.00, as she says, and for the further reason that the application is not made in good faith, but made for the purpose of preventing Mrs. Mead from making any part of her claim.

The testimony of the administrator shows that the house and two lots deeded to him about 1910 were estimated to be worth from \$600.00 to \$700.00. The administrator has paid out about \$8.00 or \$9.00 for witness fees and \$5.30 for the funeral dress. The funeral expenses were \$90.00. There was also a claim filed for digging a grave, and a livery bill. The total claims filed amount to about \$685.00, including the allowance of objector's claim. The funeral expenses have not been paid, nor has anything been paid on Mrs. Mead's claim. The estate is insolvent. The administrator, as a witness, admits that there is feeling between himself and his aunt, Mrs. Mead, because of her coming to nurse his mother.

The contention of the appellant is, that the cost of a monument is a part of the funeral expenses under the statute, and that the court should not have preferred Mrs. Mead's claim, or a part of it, as ahead of the expense for monument; that if there is not money enough to pay all the funeral expenses they should be prorated. We have no argument for appellee. Appellant cites a number of cases from this and other states in support of his claim, among them: *Hap-*

1. EXECUTORS
AND ADMINIS-
TRATORS:
funeral ex-
penses: what
constitutes:
"monuments,"
nursing: pref-
erences.

good v. Houghton, 10 Pick. 154; *Ferrin v. Myrick*, 41 N. Y. 315; *Fairman's Appeal*, 30 Conn. 205. In the *Hapgood* case the question determined was one of pleading, and the *Ferrin* case arose on the question of a contract for funeral expenses. In the *Connecticut* case it was held that tombstones are properly a part of the funeral expenses, but it was said by the court in that case: "We do not intend to hold that an administrator or executor may procure them (tombstones) in all cases at the expense of the estate. If the estate is solvent, we think he should consult the heirs, and have the advice and approbation of the court of probate. If it is insolvent, they certainly should not be obtained without that advice and approbation. In the absence of specific legislation the propriety of obtaining them, and at what expense, may properly be left to the court." *Webb's Estate*, 165 Pa. 330; *Barclay's Estate*, 11 Phila. 123; *Porter's Estate*, 77 Pa. St. 43, are cited on the proposition that an allowance for the expense of a suitable tombstone over the grave of decedent is a legitimate item of credit in the account of an executor. *Laird v. Arnold*, 42 Hun. 136; *Re Shipman*, 82 Hun. 108, are cited to sustain the proposition that the cost of a suitable monument is properly allowed the administrator as a part of the funeral expenses.

In Kentucky, such is made a part of the funeral expenses by statute. *Hespen v. Hespen*, 31 Ky. L. Rep. 1328 (105 S. W. 99).

In *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469, it is held that the cost of a tombstone, if not prejudicial to creditors, or disproportioned to the estate, is properly allowed as a part of the funeral expenses.

But it was held in *Hisem v. Lemel*, 19 La. (O. S.) 425, [10 La. 261], that the cost of erecting a tomb was no part of the funeral expenses. See also: Note, 33 L. R. A. 666, 28 L. R. A. (N. S.) 572, and note; 18 Cyc. 439.

Our statute provides that as soon as the executor or administrator is possessed of sufficient means over and above

the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased, and next, any allowance made by the court for the maintenance for the widow and minor children. Code Sec. 3347. Under this statute, it has been held by this court, in *Crapo, Executor, v. Armstrong*, 61 Iowa 697: "That a tombstone is a proper expenditure to be made by an executor as pertaining to the funeral expenses, and that such expenditure may be made without any direction by will, and notwithstanding the estate may be insolvent. . . . We think that in the absence of any statutory provision upon the subject, the propriety of obtaining tombstones or monuments, and the amount to be expended therefor, may very properly be left to the circuit court having the supervision of the settlement of the estate." And in *Lutz v. Gates*, 62 Iowa 513, 514, it is held that a suitable monument may properly be erected to the memory of a deceased person and the cost thereof paid by the administrator out of the funds of the estate. In *Mullinnix, Adm'r., v. Brown*, 151 Iowa 468, at 475, it is held that the cost of a suitable monument for one deceased is as properly chargeable against his estate as are the funeral expenses; and that lands may be sold in the absence of a personal estate to meet such claims. Appellant also cites *Foley v. Brocksmit*, 119 Iowa 457, where the court said, referring to funeral expenses: "The law with reference to such matters is well settled and generally understood. Such charges are not, strictly speaking, debts due from the deceased, but charges which the law out of decency imposes upon his estate. And so far as these are reasonable in amount they take legal priority of all such debts; as likewise do the administration charges."

But there was no question in regard to a monument in that case. There can be no question as to the propriety of the allowance of such a claim. Some of the cases outside of Iowa, while holding that the cost of a monument is proper funeral expense, do not decide the point that they are such so as to be a preferred claim ahead of other creditors, and

none of the Iowa cases so hold. The *Crapo* case, *supra*, seems to hold, inferentially, at least, that such a claim would not come under the statute quoted.

We are of opinion that, while such an expenditure pertains to the funeral expenses, it is not such strictly and so as to come within the provisions of the statute referred to, but we think it may be made so by the court within its sound discretion. One hundred fifty-six dollars of Mrs. Mead's claim, being for nursing, would be a preferred claim as expense of the last sickness, under the statute. The court did not err in requiring the administrator to pay that much of her claim before using any of the funds in his hands to erect a monument. It follows, then, that the order of the district court was right, and it is—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

WILLIAM MENEFFEE et al., Appellees, v. ARTHUR WHISLER,
Appellant.

NEGLIGENCE: Contributory Per Se—Facts Not Constituting. A
1 fair conflict in the evidence renders the question of plaintiff's
contributory negligence one for the jury.

PRINCIPLE APPLIED: Plaintiff, with a stallion hitched to a single-seated buggy, was going south on a street at about 9:00 P. M. Within a step of the terrace on the west side of the street and to the west of the beaten path in the street stood an automobile facing southeast and 450 feet from street corner to the south. This automobile had both Prest-O lights burning, the rays extending 150 feet to the southeast. Defendant came from the west with one dim kerosene light, turned the corner north and claimed he was blinded by the lights of the standing car and unable to see plaintiff approaching from the north and behind the standing car. Width of street between terraces was 34 feet. Plaintiff saw defendant's light when it was between the corner and the standing car but says he did not know it was an auto light. When defendant turned into the street and started north

the jury could have found that he was near the west side of street, then turned to the east, but as he neared the standing car turned toward it, without signal at any time. He was driving 8 or 10 miles per hour at time of collision. Plaintiff turned toward the standing car as he started past it, and defendant's car hit the horse. *Held*, plaintiff was not guilty of contributory negligence *per se*.

CONTINUANCE: Amendment to Pleading—Surprise. A continuance 2 on the ground of surprise was properly denied under the following facts: Plaintiff was seeking to recover damages for injury to his horse. Three days before trial plaintiff amended by making another party a joint plaintiff, alleging he was part owner of the horse. No issue was tendered on the ownership of horse. The new joint plaintiff was not present when the collision occurred which injured the horse.

Appeal from Louisa District Court.—HON. OSCAR HALE,
Judge.

FRIDAY, FEBRUARY 12, 1915.

ACTION at law to recover damages for injury to plaintiff's horse, occasioned by the alleged negligent operation of an automobile driven by defendant. Trial to a jury. Verdict and judgment for plaintiff for \$50.00. Defendant appeals.—*Affirmed.*

Weaver, Briggs & Erwin, for appellant.

Molsberry & Reaney, for appellees.

PRESTON, J.—The action was brought originally by Meneffee, and the allegations of the petition are, substantially, that on the occasion in question he was driving a stallion attached to a single-seated buggy south on Fourth Street in Wapello, Iowa, about nine o'clock P. M.; that defendant was going north in his automobile; that when defendant and plaintiff approached each other defendant failed to turn out of the beaten track or to give the plaintiff any portion of the traveled

road; that plaintiff turned to the right as he met defendant, but, on account of another automobile that was standing in the road at the point where the plaintiff and defendant met, plaintiff was unable to turn further to the right in order to pass defendant, and was unable to give all the road to defendant; that defendant failed to turn to his right, but struck plaintiff's horse, injured the horse's foot and caused the horse to be frightened at automobiles; that plaintiff was free from negligence; that defendant was operating his machine in a careless manner; that he had no head lights burning; that he could have seen plaintiff if he had had such lights. The defendant answered by a general denial and filed a counterclaim for injury to his car. January 19, 1914, plaintiff amended his petition, alleging that D. E. Thompson is a part owner of the horse as a co-partner, and made him a party plaintiff. The trial was had January 21, 1914. Defendant moved for a continuance because of the filing of the amendment on the ground of surprise. The grounds of negligence submitted were that the defendant was negligently operating his automobile; that it was improperly lighted, contrary to the statute, and that he did not give a signal.

The evidence tends to establish the allegations of the petition. It appears that the collision occurred about nine o'clock in the evening on a street running north and south;

that on the west side of the beaten track, and as some of the witnesses put it, about one step from the terrace on the west side of the street, there was standing an automobile belonging to one Kremer. The Kremer car was facing southeast. It had Prest-O lights burning, and the testimony is that their rays would extend one hundred and fifty feet, or more, in a southeasterly direction. Plaintiff was going south and defendant was going north. It was about four hundred fifty feet from the standing automobile to the Walker corner south; defendant came to the Walker corner from the west and as he proceeded north on Fourth Street he claims to have been blinded by the

1. NEGLIGENCE:
contributory
per se: facts
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ing.

lights from the Kremer car, and he was unable to see plaintiff, who was approaching from the north and behind the Kremer car.

But two errors are assigned: first, that the verdict of the jury was not sustained by sufficient evidence and was contrary to law, inasmuch as the evidence showed contributory negligence on the part of appellee; and second, the court erred in overruling appellant's motion for a continuance.

Counsel for appellant state in argument that they have elected to argue only two of the errors alleged in the motion for new trial.

I. It is said by appellant that plaintiff attempted to drive between the Kremer car and defendant's car when plaintiff and defendant met at about the Kremer car. Some of the witnesses testify that the width of the street between the terraces on either side was thirty-four feet, and, as before stated, that the Kremer car was near the west line of the street. The evidence tends to show that there was but one light on defendant's car at the time of the accident, and that this was a kerosene oil light and dim.

Plaintiff admits that he saw the light on defendant's car when defendant was between the Walker corner and the Kremer car, but testifies that he did not know that it was an automobile light, and there is evidence tending to show that as defendant came from the west and turned into Fourth Street he was near the west line of the street, then turned to the east toward the east side of the street, but that as he approached the Kremer car he turned to his left, or northwest, and towards the Kremer car. The defendant would be within the rays of the lights of the Kremer car part of the time as he was going north, but probably not all the time. Plaintiff doubtless assumed that defendant would turn to the right as they approached the Kremer car, at least that would be a circumstance proper to be considered as bearing upon the question as to whether plaintiff was guilty of contributory negligence.

There is testimony tending to show that defendant gave no signal as he approached the Kremer car, or at the Walker corner. He was driving from eight to ten miles an hour at the time of the collision.

It is claimed by appellee that defendant turned to the east before he reached the Kremer car, and then as he passed the lights of the Kremer car changed his course again, turning back towards the west. Plaintiff turned toward the Kremer car as he started past it, and defendant's automobile collided with the horse.

We have indicated the general tendency of the evidence, and, though some of it is disputed, we think there is such a conflict as that the court cannot say, as a matter of law, that plaintiff was guilty of contributory negligence. It was for the jury.

II. We think the trial court did not abuse its discretion in overruling the motion for a continuance. Three days had elapsed from the time of the filing of the amendment, bringing in the new party, until the trial. In his answer defendant did not tender any issue as to the ownership of the horse. In his motion he states that the amendment setting up the allegation of ownership came at such a time in the proceedings that the defendant was unable to provide a defense and would not have an opportunity to avail himself of possible admissions of the new plaintiff and to ascertain whether or not the new plaintiff was at the time guilty of contributory negligence, or to ascertain whether defendant had any counterclaim against the new plaintiff. Thompson, the party brought in by the amendment, was not a witness on the trial and was not present at the time of the collision.

There is no showing made on the motion for new trial as to any of these matters, and it is not claimed even now that any of these grounds existed. There was no material change in the issues and, as already stated, there was no question as to the ownership of the horse at any stage of the trial. In

addition to this, the court, in ruling on the motion, did so with leave to defendant to renew the motion at any later time during the proceedings. The motion was not renewed. The same argument applies to the refusal to extend the time to plead. The case was tried on the theory that all allegations of the petition and amendment were denied.

The record does not show any prejudicial error, and the judgment is—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

In re Estate of JOHANNA MILLER, Deceased, D. H. SLEICHTER, Administrator, Appellee, v. DOROTHEA KROGER et al., Appellants.

EXECUTORS AND ADMINISTRATORS: Final Report—Hearing

- 1 Thereon—Objections—Fraud of Administrator. Beneficiaries of an estate may, on the hearing on the administrator's final report, file objections thereto charging the administrator with fraud and collusion in the allowance of a claim against the estate and are entitled to hearing on such issue.

EXECUTORS AND ADMINISTRATORS: Final Report—Hearing

- 2 trator—Loss—Liability. Whether an administrator can be held liable for mere negligence without bad faith, query.

Appeal from Washington District Court.—HON. HENRY SILWOLD, Judge.

THURSDAY, NOVEMBER 5, 1914.

REHEARING DENIED FRIDAY, FEBRUARY 12, 1915.

APPEAL from an order of the district court, sitting in probate. The order complained of struck from the record certain objections made by the appellants to the Final Report

of the Administrator of the estate of Johanna Miller. Such objections charged the administrator with fraud and collusion with a claimant against the estate, and asked that he be required to account and pay nevertheless to the beneficiaries of the estate, the amount awarded to such fraudulent claimant.—*Reversed and Remanded.*

Edmund D. Morrison and George F. Morrison, for appellants.

W. M. Keeley, for D. H. Sleichter, Administrator, appellee.

C. A. Dewey, County Attorney, for W. C. Brown, State Treasurer, appellee.

EVANS, J.—1. In June, 1911, Johanna Miller died intestate, survived by three sisters and a brother as her only heirs at law. Two sisters and the brother are the appellants herein. They are residents of Germany. The other sister, Anna Kroger, is a resident of this country and was such at the time of the death of Johanna Miller; but was a non-resident of Iowa.

She was called to the bedside of Johanna shortly before she died. Prior to such time Johanna had been the owner of certain moneys and credits amounting to about \$9,000.00.

After her death, the surviving sister, Anna, was in possession of said property, claiming to have acquired the same by gift. The present administrator was appointed upon the petition of Anna. She brought an action in the district court against the administrator and the other heirs of Johanna, the appellants herein, asking, in effect, that she be adjudged to be the absolute owner of such property.

Notice was served upon these appellants by publication only. The administrator appeared and made at least a formal defense, though without the assistance of counsel. A decree

was entered for the plaintiff. Thereafter and within two years, these appellants appeared in such suit and filed a motion that the judgment be set aside, and that they be permitted to defend on the ground that they were served by publication only. This motion was sustained. Thereafter and before any further trial was had, the plaintiff dismissed her suit against the appellants. The apparent purpose of such dismissal was to avoid a re-trial. No re-trial was ever had, nor was any further order made in such suit.

The administrator filed his final report, ignoring therein all reference to the assets involved in the suit referred to. The appellants as beneficiaries of the estate appeared and filed objections. The administrator amended his report and set up the judgment in favor of Anna Kroger as an adjudication binding upon him and as excusing his failure to list such securities as property of the estate. The objections filed by the appellants charged in effect that the administrator fraudulently and collusively aided the claimant Anna in obtaining the adjudication against him as administrator. To such objections was appended the following prayer:

"Wherefore, the undersigned ask that said report and accounting on file be disapproved and rejected; that said administrator be required and ordered to account for and to pay into court in addition to the assets accounted for in said report the further sum of nine thousand dollars; that each of the items of credit by him claimed to which objection is hereinbefore made be rejected and that he be allowed no credit therefor and that the said assets of said estate, to wit, nine thousand dollars, be divided among these objectors as provided by the statutes of Iowa, to wit:"

The administrator moved the court to strike such objections on the ground that the issues thereby tendered could only be heard and tried in a direct proceeding, and that they could not be tried in the form of mere objections to the admin-

istrator's report. This motion was sustained, and from such order was the appeal taken.

The definite question presented is whether it is competent for the beneficiary of an estate to include in his objections to a final report of the administrator, a charge of fraud

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| 1. EXECUTORS
AND ADMINIS-
TRATORS: final
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objections:
fraud of ad-
ministrator. | and collusion against the administrator in the establishment of a claim against the estate, and to ask that the amount thus fraudulently established shall be nevertheless charged against the administrator in his final report. |
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On principle, such method of procedure would seem to be quite free from objection. Such a method of procedure would seem also to conform to the spirit of the statute giving full power of review to the probate court at any time before the final discharge of the administrator. Code Sec. 3398.

The opposing contention is based upon the opinions of this court in *Ashton v. Miles*, 49 Iowa 564, and *Pennock's Estate*, 122 Iowa 622.

In each of those cases the administrator himself had been a claimant against the estate. As to such claim a special administrator had been appointed to investigate and defend. The claim was regularly established. For the amount so established and allowed by the special administrator, the administrator took credit in his final report. The beneficiaries filed objection, charging fraud in the establishment of the same. It was said by this court that such question could not be thus tried, but that a direct attack should be made upon the adjudication.

It will be noted that in the establishment of such claim in his own behalf the claimant, though administrator of the estate, was not acting as such. As to his claim he could not act as such. In the prosecution of such claim, therefore, he sustained no relation of trust to the estate. He stood toward the estate precisely as any other third party who was making a claim against it. The claim being once established, it could

only be re-opened for further trial by appropriate proceedings directed against the claimant himself.

In each of the cited cases, the court found as a fact that there was no fraud. There was therefore no discussion of the point now under consideration. Nor is the state of the record, with reference to such point, very clear.

Assuming in the case before us that the adjudication in favor of Anna Kroger could not be set aside, as to her, by this method of procedure, it does not follow that the administrator might not be required to stand the loss, if the established claim was in fact fraudulent to his knowledge, and if he fraudulently and collusively aided in its establishment. That is all that is asked by the objectors.

In *McLeary v. Doran*, 79 Iowa 210, it was held that the beneficiaries could have recourse against the administrator in such case.

In response to this case it is urged by appellee that the recourse here intended was an action on the bond. But the chief purpose of an action on the bond would be to charge the surety for the defaults of his principal.

We apprehend if the final report of the administrator were approved, and if he made distribution according to its call, there would be no basis left for an action on the bond.

In *Ryan v. Hutchinson*, 161 Iowa 575, the right of an objector to tender an issue of fraud and collusion on the part of the administrator is implied.

In re Douglas, 140 Iowa 603, 605, is a case wherein such right is distinctly recognized. To the same effect is *Rabbett v. Connolly*, 153 Iowa 607.

In the last two named cases it is held that a motion to set aside the allowance of a claim is a direct attack upon it.

This holding may be a slight modification of what was said in the *Ashton* and *Pennock* cases. In the case before us, the objectors appended to their objections the prayer which we have above set forth. Such prayer contains all the essential requisites of a motion based upon the ground set forth in

the objections. To the extent of the relief prayed for, therefore, it is a direct attack even though it asks less than the setting aside of the adjudication.

We reach the unavoidable conclusion, therefore, that it was open to the beneficiaries in this manner to tender the issue of fraud and collusion and that they were entitled to a hearing upon it. The striking of their allegations necessarily denied them such hearing.

2. It will be noted from the foregoing that we have dealt only with the allegations of fraud and collusion as a ground for denying credit to the administrator for the payment of the alleged fraudulent claim. The objectors did also allege that such fraudulent claim was allowed through the negligence of the administrator.

2. EXECUTORS
AND ADMINIS-
TRATORS : neg-
ligence of ad-
ministrator :
loss : liability.

Whether the objectors would be entitled to relief against the adjudication by a showing of mere negligence, without bad faith on the part of the administrator, is a question which has not been argued. We are not disposed to make any pronouncement upon that feature of the case without the aid of argument.

Though an administrator could be held liable for fraud and collusion, it would not necessarily follow that mere negligence would charge him with the same liability. Justice often finds its mark even though the litigant be negligent.

It is doubtless true also that some degree of negligence enters into most litigation, and that skill and diligence are not necessarily determinative.

3. It will be noted also that in our discussion in division 1 hereof, we have assumed that the adjudication in favor of Anna Kroger has never been set aside. In so doing, we have conformed to the theory of the argument.

In view of the fact that the suit of Anna Kroger was brought, not only against the administrator but also against all the beneficiaries of the estate, and her adjudication was had against all; and in view of the fact that the bene-

ficiaries of the estate appeared within the statutory time and moved that the adjudication be set aside, and that such adjudication was set aside, we are not prepared to say affirmatively that there was any adjudication left even as against the administrator. *Bowman v. Parks*, 166 Iowa 403.

He was only a representative of the beneficiaries. The problem presented is, whether the beneficiaries could win and their representative lose. We have formed no opinion on this question. But as it is liable to arise at any future stage of the proceedings, we only take the precaution to confine our present holding to the single question argued before us.

The order of the trial court must be reversed.—*Reversed and Remanded.*

LADD, C. J., WEAVER and PRESTON, JJ., concur.

CHRIS WIEFENBACH, Appellee, v. PETER LAMP, Appellant.

MASTER AND SERVANT: Evidence—Verdict—Sufficiency to Support. Evidence reviewed and held sufficient to support a verdict on the contract alleged.

APPEAL AND ERROR: Verdict—Trifling Excess—Reversal. Causes
2 will not be reversed for a trifling excess in verdict—\$4.50 in instant case.

Appeal from Monona District Court.—HON. JOHN F. OLIVER,
Judge.

FRIDAY, FEBRUARY 12, 1915.

ACTION to recover for services. Defendant claimed he had overpaid plaintiff and, by way of counterclaim, sought to recover back \$65.00. There was a trial to a jury and a verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

C. E. Cooper, for appellant.

J. A. Pritchard, for appellee.

PRESTON, J.—The errors relied upon are: That the verdict is contrary to law, not sustained by the evidence, and is the result of passion and prejudice on the part of the jury; that in defendant's account introduced there was shown as labor performed on Sunday for which credit was allowed plaintiff the sum of \$3.00, and another of \$1.50; that the court failed to instruct the jury that this amount should be deducted.

1. MASTER AND
SERVANT: evi-
dence: verdict:
sufficiency to
support.

It appears that plaintiff came to this country about the year 1909, and soon after commenced working for defendant, feeding cattle, hogs, sheep, and doing barn chores, milking cows, and the like; that defendant is feeding stock on quite a large scale, sometimes having as many as six hundred cattle, at other times from fifty to two hundred and fifty, and from five hundred to one thousand sheep, three or four hundred hogs, several milk cows, and horses. Plaintiff began work for defendant in the year 1909 and continued more than four years, starting at \$25.00 per month, and at the time he quit defendant's service he was getting \$42.00 per month.

The defendant contends, and so testifies, that plaintiff was to do all the work, including feeding and caring for the stock on Sunday, and that such was the agreement at the time of plaintiff's employment, while plaintiff claims that there was an agreement between plaintiff and defendant that plaintiff should be paid extra for his work on Sundays. He testifies in part:

"I quit Pete Lamp once, and I said, 'Pete, I no make this and feed the cattle Sunday for nothing, I say the month has got twenty-six working days, and I work for you by the month, and you say pay me for Sunday,' and Pete got another

man to work by the month, and then Pete come to me, and said, 'I pay you for Sunday.' The first time I quit was because I wanted wages on Sunday."

Witness Hamilton testifies: That he worked for defendant seven years, and that plaintiff was working for defendant at the same time; that plaintiff would not feed on Sundays for nothing, and defendant said he had to pay plaintiff to work on Sunday; feed the cattle and do other work which amounted to about the same as any other day; that he thinks it would be worth \$1.75 a day, and that he (witness) was receiving that amount.

There is no claim in the pleadings or argument that the contract was invalid because it was for Sunday work, and no question is raised that the work of feeding stock was not a work of necessity.

It appears that in October, 1909, defendant gave plaintiff a small check for the balance defendant claimed was then due, and which states that it is in full for labor, and another check after that to the same effect. But plaintiff testifies that he cannot read English.

Defendant's son-in-law, who was agent for defendant, testified as to these matters and statements. But there was no pleading, and there is no question raised in argument that such checks or settlement were a full settlement for the Sunday work. The fact that there were such settlements would be proper, however, for the jury to take into consideration as bearing upon the question as to whether or not there was such a contract as plaintiff relies upon for his Sunday labor, and it would be proper, of course, for the jury to take into consideration his explanation and all the facts and circumstances shown in the case having a bearing upon that question. Whether there was such a contract was a question for the jury because of the conflict in the testimony.

It should be said, however, that plaintiff claimed pay for Sunday work from the beginning of his employment, and

claimed \$571.31, \$28.81 of which he claims is due for a balance of wages under the monthly employment, and the balance for Sunday work. The jury by their verdict, however, allowed plaintiff only \$191.36, so that evidently the jury did not allow for the full time and may have allowed the items set up by defendant by way of counterclaim and this he claims was an overpayment to plaintiff. There is nothing to indicate passion or prejudice on the part of the jury, and we think the verdict is supported by the evidence.

As stated, plaintiff worked for defendant about four years. He quit during the first year, according to his own testimony, because Lamp would not pay him for Sunday, and plaintiff testifies that defendant then hired him and agreed to pay him for his Sunday labor. The jury must have computed the time commencing at the time the contract was made, and not at the time Wiefenbach commenced working for defendant, and, as stated, there being a conflict, the question was for the jury.

As to the alleged failure of the court to instruct the jury as to the credit of \$3.00 and another of \$1.50, we have to say that we would not be disposed to reverse the case for \$4.50,

2. APPEAL AND
ERROR: ver-
dict: trifling
excess: re-
versal.

even if there was error at this point, such an amount being too trivial a ground for reversal. If the evidence showed that defendant was entitled to such a deduction, we could

do that here. Defendant did not ask such an instruction, and there is nothing in the record to show that the jury did not allow that claim. But we think the instructions did cover the point. The court fully instructed as to plaintiff's claim for the balance due under the monthly employment, and also as to the alleged contract for extra pay on Sunday. The instructions were quite full, and among them the court stated to the jury:

- "If you find from the preponderance of the evidence that defendant has paid plaintiff on account of the regular monthly

employment in question more than was due plaintiff on account of the same, then Mr. Lamp will be entitled to recover on the counterclaim the excess that he has so paid the plaintiff, and you will award him that amount on his counterclaim, as you find the same from the evidence. But if you do not so find; or if you believe that the plaintiff has not been overpaid, or received any sum or payment from defendant in excess of what would be due him on account of the regular monthly wages, then Mr. Lamp will not be entitled to recover anything on his counterclaim. When you have settled these issues, under the rules that the court has given you, if you find for the plaintiff in any sum whatever on any of the claims made in his petition, and you find for the defendant on his counterclaim in any sum whatever, you will then offset the one finding against the other, and return your verdict on the whole case in favor of the party for whom you find the greater sum, in such an amount as that sum exceeds the lesser."

There were other instructions on this subject. No other complaint is made of the instructions than that before indicated. The instructions authorized the jury to determine the whole account and what, if anything, was due either party, taking into consideration the entire account.

There is no error, and the judgment is—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

EUNICE MAUD BAKER, Plaintiff, v. SARAH TERRELL et al., Defendants. W. J. BAKER et al., Appellants. CHAS. W. BROWN et al., Appellees.

WILLS: Partition—Purchase of Share—Advancements Charged
1 Against Share—"Hotchpot"—Who Entitled to. Whether a purchaser of the undivided share of a devisee in real estate, later sold on partition, is entitled, on division of the proceeds, to any

portion of a hotchpot (made up by charging the shares of certain devisees in said real estate with advancements, etc., treated as personalty) which would have gone to such devisee had he not sold his share, or whether the devisee is entitled to such "hotchpot" share, depends on whether the hotchpot is made up wholly or in part of a charge against the particular devisee who has sold his share and, if so, whether the "hotchpot" share exceeds the charge against the particular devisee.

PRINCIPLE APPLIED: A will charged certain shares with advancements, etc., otherwise gave six devisees all real and personal property equally. The will treated the advancements as personalty. On partition the court decreed a one-sixth interest in the land in each devisee, charged certain shares with advancements in accordance with the will and ordered said charges paid from the personalty, if any, but it seems there was none. Two devisees had in the meantime lost their shares in the land under sheriff's deed which was appropriately covered by the decree. Net proceeds of land were \$17,850. Charges against the shares were:

Eunice B., no charge.....	share	\$2,975
Sarah T., no charge.....	"	2,975
John B., charged \$ 270.....	"	2,705
Frank B., charged 1,600.....	"	1,375
W. J. B., charged 1,267, sheriff's deed to Brown..	"	1,708
Hanley, no charge, _____ sheriff's deed to Webber.	"	2,975

Hotchpot\$3,137

Held, Webber was not entitled to one-sixth of the hotchpot, and that Hanley was.

Held, Brown was entitled to all of the one-sixth of the hotchpot, which would otherwise have gone to W. J. B., such share of the hotchpot being less than the charge against the share of W. J. B.

Appeal from Wapello District Court.—HON. F. M. HUNTER,
Judge.

SATURDAY, FEBRUARY 13, 1915.

ACTION of partition. There was a decree confirming shares and ordering a sale by the referee. After the sale and report of the referee, a controversy arose over the distribu-

tion of the proceeds. The appeal is from the order of distribution and not from the decree confirming shares.—*Modified and Affirmed.*

A. C. Steck and E. K. Daugherty, for appellants.

Jaques & Jaques, for appellees, Chas. W. and Lincoln Brown, Ottumwa Savings Bank and John F. Webber.

EVANS, J.—Lewis Taylor Baker died testate in 1898 seized of the land involved herein. He left surviving him his widow and six children. By his will he devised and

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|---|---|
| 1. WILLS: partition: purchaser of share: advancements charged against share: "hotchpot": who entitled to. | bequeathed all of his estate both real and personal to his widow for life and the remainder to his six children share and share alike subject to certain charges therein stated. The parties to this case include all the children of Lewis Taylor Baker now living and representatives of one deceased. The defendants Chas. W. and Lincoln Brown appeared and claimed to be the owners under a sheriff's deed of the former share and interest of one of the heirs, W. J. Baker. Defendant J. F. Webber appeared and claimed to be the owner of the share of one of the other heirs, Minerva Hanley. The latter heir being now deceased the defendants Stater and Aiken appeared as her representatives and only heirs at law. The only controversy presented is (1) between W. J. Baker and the Browns and (2) between the heirs of Minerva Hanley and Webber. Though a controversy and trial preceded the original decree confirming shares, no appeal was ever taken therefrom by any party and no complaint is made of it now. We take such decree therefore as our starting point. By such decree the court made the following findings: |
|---|---|

"The court further finds that at the time of the death of Lewis Taylor Baker, W. J. Baker was indebted to said

estate on four notes of \$329.37 each, dated April 3, 1893. That thereafter Jane Baker cancelled said notes by a settlement between herself and W. J. Baker, March 15, 1900, and in lieu thereof took a note to herself as widow from said W. J. Baker for \$634.71, with six per cent interest per annum payable annually and interest if not paid when due to draw eight per cent, and that there is at this time due on said note the sum of \$1,267.00, which the court finds is a charge against the interest formerly owned by W. J. Baker in the real estate sought to be partitioned in this suit.

"Subject to said charge, the court finds that Chas. W. Brown and Lincoln Brown are the owners of an undivided one-sixth interest in the land sought to be partitioned by this suit formerly owned by W. J. Baker, and that Eunice Maud Baker who claims said interest has no right, title or interest in the same, but that she as a daughter of Lewis Taylor Baker is entitled to an undivided one-sixth thereof.

"The court further finds that Sarah Terrell is entitled to an undivided one-sixth thereof; that John Hill Baker, subject to a charge of \$270, is the owner of an undivided one-sixth thereof; that Frank Douglass Baker is the owner of an undivided one-sixth of said real estate, subject to the advancement made to him by his father of \$1,600.00; and that John F. Webber is the owner of an undivided one-sixth interest in said real estate.

"The court further finds that said land cannot be divided among said several parties without detriment to the value of the whole and that it ought to be sold and the proceeds divided between the respective parties entitled thereto, as herein defined. . . .

"It is further ordered, adjudged and decreed that the title of the above named parties in and to the land above named be and the same is confirmed and partition thereof is made between the said parties in the manner in which they are shown to be entitled thereto, to wit: To Eunice Maud Baker one-sixth of the net proceeds; to Sarah Terrell one-sixth

of the net proceeds; to John Hill Baker, subject to a charge of \$270, is entitled to one-sixth of the net proceeds; Frank Douglass Baker, subject to an advancement of \$1,600, is entitled to one-sixth of the net proceeds; and Chas. W. and Lincoln Brown, jointly, are entitled to one-sixth of the net proceeds, subject to a charge thereon of \$1,267. . . ."

The decree also provided that the order of distribution should be deferred until after the sale and that such order might be made either in vacation or term time upon ten days' notice to the interested parties. The charges made against the respective interests of Frank, W. J. and John Baker were based upon the provisions of the will of the testator.

The total selling price of the land was \$17,787. To this sum was added \$380 rents received. From this total the expenses were deducted leaving net proceeds reported by the referee of \$17,850. It would seem clear that one-sixth of this amount would represent the distribution to each owner of an unencumbered one-sixth share. It would seem equally clear that the owners of the encumbered shares would each receive the same amount less the charges against them. It will be noted that the charges against three of the shares amount to a sum total of \$3,137. Under the will of the testator this sum inured in the first instance to the widow who had the right to collect the same if she so elected. Subject to the right of the widow the fund inured to the benefit of the estate and each of the testator's children became entitled to one-sixth thereof. But Webber contended that he was entitled to recover one-sixth of such amount in addition to one-sixth of the net proceeds of the sale on the ground that he had acquired all the interest of Mrs. Hanley in such real estate and that these charges were a part of the real estate. This claim was sustained by the trial court and Webber was awarded one-sixth of the net proceeds of the sale plus one-sixth of the \$3,137. This was clearly erroneous. The decree confirming shares fixed Webber's share at one-sixth and no more. There

were no charges against Mrs. Hanley. The charges against the three heirs were treated by the testator in his will as personalty. Under no circumstances could they be deemed as a part of the real estate though they were a lien upon the real estate. The sheriff's deed under which Webber held carried all the interest of Mrs. Hanley in the real estate. It so purported. But it did not carry all her interest in her father's estate nor did it purport to do so. The effect of the order of distribution as made was to give to Webber all the remnant of Mrs. Hanley's interest in her father's estate. He was not entitled to it either under the terms of his sheriff's deed or under the provisions of the original decree confirming shares. It follows likewise that the representatives of Mrs. Hanley were entitled to their mother's share of the personalty as represented by the fund created by the charges referred to.

II. It will be noted from the record above set forth that the share of W. J. Baker to which the Browns succeeded under a sheriff's deed was subject to a charge against him of \$1,267. Baker claimed that he was entitled to segregate and take for himself one-sixth of said fund of \$3,137 notwithstanding that his share of the real estate had passed to the Browns. On the other hand the Browns contended that though they necessarily took this share of the real estate subject to the charge against it such charge nevertheless was the debt of Baker; that as between him and the other share-owners the charge against him and the credit in his favor necessarily went into hotchpot; that the result of the hotchpot left nothing due to Baker; that the credit to which he would otherwise have been entitled simply operated to reduce the charge against him. Such was the order. We think it was correct. The share of the real estate in the hands of the Browns was never chargeable with any greater amount than was necessary to satisfy the provisions of the will. If Baker had continued to hold the share the order of distribution would only have reduced the charge against this one-sixth share by the amount of the credit which would otherwise be due him as one-sixth of the hotch-

pot. It is to be noted further that the original decree from which no appeal was taken provided that the charges against the shares of real estate should be paid out of the personalty if any there was. This portion of the original decree is quite decisive of the controversy between the Browns and W. J. Baker. If Baker had had any balance due to him out of hotchpot over and above the charges against him and if the Browns had claimed such surplus in addition to their one-sixth of the net proceeds, an entirely different question would be presented. This is the difference between the position of Webber and that of the Browns. The order entered below will be modified as indicated in the first division hereof by reducing the amount due Webber to one-sixth of the net proceeds and by awarding one-sixth of the \$3,137 to the representatives of Minerva Hanley. In other respects the decree will be affirmed. Motion of appellees to dismiss the appeal is overruled. Costs taxed to appellant W. J. Baker and appellee Webber.—*Modified and Affirmed.*

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

CHARLES BETTINGER, Appellant, v. IGNACE BETTINGER et al.,
Appellees.

PARTNERSHIP: Evidence of—*Sufficiency.* Evidence reviewed and
1 held insufficient to show the existence of a partnership.

TRUSTS: Evidence of—*Sufficiency.* Evidence reviewed and held
2 insufficient to establish a resulting trust.

WORK AND LABOR: Father and Son—*Implied Agreement.* Where
3 a son had the unrestricted control and management of the father's property and collected and converted the entire income thereof to his own use, the implication arises that the son was working for himself and not for the father.

Appeal from Webster District Court.—HON. R. M. WRIGHT,
Judge.

SATURDAY, FEBRUARY 13, 1915.

ACTION in equity for an accounting and for other relief.
Petition dismissed and plaintiff appeals.—*Affirmed.*

Mitchell & Fitzpatrick, for appellant.

Healy, Burnquist & Thomas, for appellees.

WEAVER, J.—The defendant, Ignace Bettinger, is father of the plaintiff and the other defendants are the widow and heirs of plaintiff's deceased brother, Eugene Bettinger. The petition alleges that Ignace Bettinger and his named sons were natives of Germany; that plaintiff first removed to the United States where he was later followed by his father and Eugene; that after the father's arrival in the year 1884, he with his two sons entered into a partnership to carry on the business of farming rented land in Iowa, each partner contributing to the enterprise all the money and property he then had; that as a matter of convenience the business of the partnership was carried on and the title to its property was held in the name of their father but that in fact Ignace, Charles and Eugene were the real owners, proprietors and parties in interest and in equal proportions, and that this partnership in the business of farming continued about seven years during all which time plaintiff gave his entire time and labor in serving or promoting the common or partnership enterprise. It is further alleged that in the year 1891 the partnership sold and disposed of all its property except horses and by mutual agreement the partners invested some or all of the assets of the firm in the purchase of certain lots in the city of Fort Dodge, Iowa, upon which they constructed a barn, purchased horses, carriages and other property with

which they established and carried on a livery and feed stable and continued in that business until September, 1911; that plaintiff with some assistance from Eugene was the active manager of the business giving to it all his time and labor and received no compensation therefor except his board and clothing and a small amount for his personal expenses; that the title to the property was in the name of Ignace Bettinger but was so taken and held by him in the interest of the partnership; that Eugene Bettinger died in August, 1911, and his interest in the partnership property is now represented by his widow and children who are made defendants herein; that in September, 1911, and while plaintiff was confined in the hospital at Knoxville, Iowa, Ignace Bettinger sold and disposed of all the personal property belonging to the partnership for the sum of \$1,100 and refuses to account to plaintiff for any part of said sum, or for the rents and profits received from the real estate. It is further alleged that none of the agreements between the parties was ever reduced to writing but were wholly in parol. Plaintiff also claims that his services to the partnership were of the fair value of \$300 per year in addition to the support which he had received, no part of which earnings has been paid.

Upon these allegations he asks that the partnership be dissolved, that he be decreed entitled to one-third of its assets including the real estate above mentioned and that said property be partitioned accordingly. He further asks by way of alternative relief that in case his claim of partnership be not sustained he may be awarded judgment for a money recovery in the sum of \$12,000.

By way of amendment the plaintiff further alleges that in September, 1886, the partners employed one Schaefer to prepare a written agreement between them which would give the partnership the right to conduct the business in the name of Ignace Bettinger; that Schaefer did prepare a paper which was signed and executed by plaintiff and Eugene and duly recorded, but that said writing wholly fails to embody or

state the intention of the parties thereto and is in form and substance a bill of sale of the personal property of Charles and Eugene to Ignace; that no sale was in fact made and no consideration paid or given therefor. Plaintiff further prays that, if necessary to the granting of full relief to which he is entitled in the premises, said writing be re-formed to express the true meaning and intent of the agreement between the parties thereto.

The defendants deny that any partnership was ever agreed upon or entered into between plaintiff and his father and deny each and every other claim asserted by plaintiff for legal or equitable relief. They admit the making of the bill of sale and deny that it was made or intended for any purpose other than is expressed upon its face. It is further alleged that the property in Fort Dodge was purchased by and for Ignace Bettinger at the price of \$2,250 of which he then paid from his own money the sum of \$1,500 and secured the remaining \$750 by mortgage, and that neither Charles nor Eugene contributed any part or fraction of said purchase price. It is further alleged that Ignace Bettinger purchased and paid for the livery stock with his own funds, such purchase being made from one Howard who gave him a written bill of sale therefor; that the livery stable was conducted and carried on by Charles and Eugene for themselves alone and not in partnership with their father, that they took and received all the earnings thereof and converted the same to their own use and that during all said period plaintiff continued to live and board with his parents without paying any compensation therefor as did Eugene also until he married some ten years before his death. The answer also pleads the laches of the plaintiff as a bar to his prayer for equitable relief and the statute of limitations in bar of his alternative demand for a money judgment.

The trial court after hearing all the evidence offered found the plaintiff had failed to sustain his said claims and dismissed his petition.

I. While we have been cited by counsel on either side to numerous authorities and precedents there is no marked difference concerning the legal and equitable principles which govern cases of this kind. The real controversy is essentially one of fact. Under the issues joined the burden is upon the plaintiff to make good by a preponderance of evidence his allegation that a partnership was entered into between the father and his sons, Charles and Eugene. A careful reading of the record leads us to the conclusion that in this respect there is a failure of proof and that the finding of the trial court must be sustained. The plaintiff himself nowhere testifies unequivocally to an agreement or talk of partnership. It appears that when the parents came from Germany the two sons were then in possession of a rented farm in Webster county of this state, the lease of which would expire in 1886. Plaintiff's version of the circumstances is as follows:

1. PARTNER-SHIP: evidence of sufficiency.

“After father and mother came to Emil's in Illinois there was talk between me and my father and mother about coming out to Iowa and going farming, we said: ‘We will go out to Iowa, together there was four of us, and go farming.’ The four were father and mother and me and Gene. That was talked over at Emil's house, we talked it lots of times. I talked with my father and mother about these arrangements.”

Thereafter the father, mother and two sons came to Iowa and made their home together on the rented farm. From that time until the death of Eugene and the mother, plaintiff made his home with his parents as also did Eugene until he married some ten years prior to his death. Plaintiff paid no board and so far as shown by the evidence bore no share of the family expenses. While on the farm above mentioned the sons continued to do the principal part of the work, sold the produce, paid the debts and purchased the necessary farm

machinery and plaintiff says that whatever surplus remained "we carried home and gave it to mother," and when they needed money they obtained it from her. At the expiration of the lease which Charles and Eugene held, when their parents arrived the family removed to another farm, the lease of which was made to the defendant Ignace Bettinger. At about the same time Charles and Eugene executed to their father the bill of sale mentioned in the pleadings, which upon its face purports to be an absolute transfer to the latter of the title to the property therein described being as we infer all the property then owned by the sons. The transaction resulting in the execution of this paper is involved in some uncertainty if not mystery. The presumption is of course that it was intended to effect just what its language plainly indicates and in the absence of a clear explanation to the contrary that presumption must prevail. The explanation attempted by the plaintiff is far from convincing and wholly inefficient to justify a reformation of the instrument. The claim that the parties employed one Schaefer to prepare a writing by which the alleged partnership business could be carried on in the name of Ignace Bettinger as a mere matter of convenience lacks plausibility. Ignace was but recently from Germany, unable to speak or understand the English language (as indeed he has ever since remained). He took no active part in the buying or selling or other business transactions except that from an early date after his arrival in Iowa he loaned small sums of money to neighbors seeking such accommodation. In the first place it is difficult to see how the use of the individual name of one of the alleged partners could serve any real purpose of convenience and if it did it would have seemed much more natural for them to select the name of one or both of the sons who in fact transacted its business. So far as shown Schaefer had no interest whatever in misleading Charles and Eugene or tricking them into executing a paper other or different than they desired and intended to make and no suggestion is made that Ignace

was a party to any fraud or mistake in that connection. There is some evidence from which the inference may be drawn that the title to the personal property was transferred to the father to hinder or delay the creditors of the sons. Plaintiff concedes that after the bill of sale was made an execution in favor of one of his creditors was levied on a horse described in the bill and that the father asserting the title acquired by such bill recovered its possession. He further testifies that when Schaefer prepared the paper, "He said if we signed it it would be all right; nobody couldn't do nothing and we could do just the same business as before in father's name," a statement which perhaps furnishes the key to the real nature of the transaction. Whatever be the fact in this respect it is not a matter of controlling importance, though as an item of evidence it is not without some significance in arriving at the truth of the controversy involved in this action. The only witness who testifies to any agreement of partnership is Emil Bettinger, a brother of the plaintiff. He was present at the meeting in Illinois when the parents arrived from Germany and says, "Charley and Gene and father and mother were going out to Iowa. It was talked over in my house between them to come out and farm together in partnership. I don't know how much each of them did put in." It will be observed that the witness makes no attempt to quote the language to which he refers but rather to give his conclusions therefrom. He does not state or profess to know the terms of the alleged agreement. It must also be said that an agreement to go to Iowa and enter the business of farming in partnership carries with it no presumption that when the business of farming was abandoned seven years later, the purchase of real estate in Fort Dodge and the establishment of a livery stable thereon were a partnership transaction. Of course, if we were to find or assume that the parties farmed in partnership and that the funds of the partnership were invested in the Fort Dodge property and business it would require no great amount of additional evidence to justify the implication that such invest-

ment and subsequent business was also a partnership venture. The burden of establishing such important fact is upon the plaintiff but so far as any direct testimony bears thereon he stands alone. He is unequivocally contradicted by his father in whom the uncontested title to the property has stood for more than twenty years. Unfortunately both the mother and Eugene who were the only other persons who could speak of the fact from personal knowledge are dead. There are no writings, documents or records throwing any light upon the question except the title papers, all of which upon their face corroborate the claim made by the father. If any books of account were kept they are not shown in the record. Upon such a state of the record we can do no otherwise than hold that plaintiff's unsupported testimony is insufficient to satisfy the burden of proof which the law casts upon him to overcome the denials of the defendant and the presumption which attaches to the conveyance and bill of sale by which defendant's title was acquired. It is doubtless true, as plaintiff claims, that he and Eugene had sole charge and control of the livery business. That fact is just as consistent with the theory that defendant with parental indulgence tacitly or expressly allowed his sons to take possession of the livery outfit, operate it to suit themselves and have and enjoy what profit they could make out of it as it is with the theory of partnership. Indeed it is more consistent for there is not the slightest showing that Ignace Bettinger assumed or exercised the authority of a partner in that business or showed the interest or familiarity of a partner therein at any time during the twenty years before the death of Eugene. Nor as we read the record do we find that any part of the proceeds of the business is traced to his hands. It is the claim of the plaintiff that such proceeds over and above expenses and personal allowances were placed in the hands of his mother, but even so, it falls far short of a showing of a partnership interest in the father. It must be remembered also that this business appears to have been of comparatively unimportant character.

The original investment in the livery stock aside from horses brought from the farm was but \$500 and when the business was abandoned the property was closed out for \$1,100. That such a business, burdened as it must have been with the support of the two brothers, one of whom was for ten years the head of a family, should have accumulated and had in store large profits seems quite improbable, or if such profits were made, no part thereof is found in the hands of the defendants. It is insufficient to say, as does plaintiff, in general terms that his mother and father put out in loans the money so received. Of what loans, when or where placed, or the amounts thereof he mentions but one specific instance and then the loan was made in plaintiff's name and the note delivered into his hands.

Much is said in the record and arguments of the habits of the plaintiff though the matter is perhaps of no material importance except as a side light in arriving at the truth of the issues joined in the pleadings. Plaintiff admits that he has long been in the habit of drinking intoxicants though not, he insists, to the extent of incapacitating him to do business. He concedes, however, that after the death of his mother and Eugene he "drank heavy for a while." About that time upon the complaint of his father he was committed to the inebriate hospital at Knoxville where he remained several months. During this absence the father sold out the livery stock and closed the barn. This act of the father on the one hand and the fact on the other hand that plaintiff, when his mother was about to die, went to the house and took \$400 from the funds in her possession and converted it to his own use, brought about a feeling of hostility between father and son which has culminated in the present litigation, and the feeling between them is probably such that each speaks with a bias tending to some extravagance of statement. The father is far advanced in years and his memory is not always clear but concerning most of the material facts he speaks with a detail which is not overcome by the declarations of plaintiff, which

are almost altogether general in form and marked by absence of statement of specific facts.

The allegation of the existence of a partnership of which Ignace Bettinger was a member in the ownership of the Fort Dodge property and business has not been sustained. Whether a partnership existed between plaintiff and Eugene in his lifetime it is not material here to inquire.

II. What we have said renders unnecessary any extended consideration of plaintiff's claim to establish a resulting trust in his favor in the Fort Dodge property. The claim thus advanced is that if the court fails to find a partnership in the Fort Dodge property or business then a trust should be established in his favor because the money paid for said property was the joint fund of himself, brother and father, and the latter should therefore be decreed to hold the title so procured for the benefit of the sons to the extent of their proportionate contribution to the purchase price. Here again the question hinges solely upon the question of fact whether plaintiff, or plaintiff and Eugene, did so contribute. He swears he did and defendant swears as positively he did not. Defendant swears that the payment was made by him from money procured from Germany and explains the source of its procurement. Plaintiff and Emil say their father received no such sum from Germany but state no facts from which we can infer their ability or opportunity to know the truth in that respect. Assuming that all are trying to be candid, it is much easier for the sons to be mistaken as to the details of their father's business affairs than for him to be mistaken with reference thereto. So far as shown he alone is in position to speak with knowledge of the truth in this respect.

There is no such clear or satisfactory proof as equity requires for engrafting a trust upon an unconditional conveyance of real property and the prayer of the plaintiff for such relief was properly denied by the trial court.

- III. It is finally argued that if equitable relief be denied that defendant should be adjudged to pay plaintiff the value of his services for the twenty years or more since they removed to Fort Dodge.
8. **WORK AND LABOR:** father and son: implied agreement.

The trouble with this demand is that the record is barren of any showing that plaintiff did serve or work for his father during any portion of this period. It is true he lived with his parents during all this time without charge. With Eugene he was allowed entire control of the livery business. They received the entire proceeds thereof. There is no indication anywhere that defendant demanded or exercised the right to direct the sons or control their discretion in its management. So far as shown the sons never in any manner accounted to him concerning this business nor does he now demand such an accounting. Though they used property belonging to their father with his consent they seem to have been working for themselves alone. They lived from and upon the business—he did not. There is no evidence whatever of any express contract of employment and no facts shown from which such contract can be implied.

The decree below appears to be right upon the record submitted to us and it is therefore—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

BROWN AND BRAMMER, Plaintiffs, Appellants, v. WM. PEARSON COMPANY, LTD., et al., Defendants, Appellees.

CONTRACTS: Validity—Lex Loci Contractus—Lex Loci Rei Oite—

- 1 **Nebraska Real Estate Commission Act.** A contract void in the state where made and to be performed is void everywhere.

PRINCIPLE APPLIED: The Nebraska Real Estate Commission Act declares void all oral contracts for a commission for sale

of lands. Plaintiff, a resident of Iowa, was orally promised in Nebraska a commission if he would furnish a purchaser for defendant's Canadian land. Plaintiff produced at Omaha the prospective purchaser who was taken by defendant to Canada and made the purchase. *Held*, (a) contract invalid and (b) the invalidity was not avoided by the doctrine of *lex loci rei sitæ*.

BROKERS: Commissions—Statute of Frauds. An agency contract for the sale of land is not one which affects real estate in a legal sense.

PRINCIPLE APPLIED: (See No. 1.)

BROKERS: Commissions—Statutes Requiring Written Contract—
3 **Sufficiency of Evidence.** Evidence in the form of letters reviewed and held insufficient to establish a written contract for commissions as required by the Nebraska Real Estate Commission Act.

PLEADINGS: Amendments—Rejection—Discretion of Court. The
4 striking of an amendment at the close of the trial, pleading a written contract instead of the oral one formerly pleaded, because filed too late, is held in instant case to have been within the discretion of the court.

Appeal from Taylor District Court.—HON. THOS. L. MAXWELL, Judge.

SATURDAY, FEBRUARY 13, 1915.

ACTION by a real estate agent to recover a commission under and by virtue of an oral contract. The answer was a general denial and an affirmative plea that the alleged oral contract was entered into in the state of Nebraska and was invalid under the statute of that state. At the close of the evidence there was a directed verdict for the defendants and the plaintiffs appeal.—*Affirmed*.

Jennings & Mattox, W. M. Jackson, for appellants.

Tobin & Jensen, G. B. Haddock, for appellees.

EVANS, J.—The plaintiffs were partners engaged in the real estate business in Shenandoah. There are two defend-

ants, Wm. Pearson Company and R. S. Dewar. The Pearson Company is a corporation organized under the laws of Canada and its principal office is and was located at Winnipeg. The business of the company was to deal in Canada lands and doubtless to unload them upon credulous Americans. R. S. Dewar was its superintendent of agencies and he had an office at Omaha, Nebraska. The contract sued upon is alleged to have been entered into by means of a conversation between the plaintiff Brown and the said Dewar. It occurred at the office in Omaha. Brown was contemplating the acquiring of an agency to procure purchasers for the Pearson Company. He desired that such agency should include several counties in southwestern Iowa. The desired territory had already been given to other agents, but the possibility was open to the plaintiffs to become sub-agents in some of such territory. One of the agents who had already secured the principal part of the territory desired by the plaintiffs was McKinney. Prior to this conversation at Omaha, there had been some correspondence between Brown and McKinney. A contract of sub-agency under McKinney was discussed. No contract was entered into, neither were the negotiations terminated. Some investigation of the Canada lands was desired by the plaintiffs. On the other hand, McKinney would be the other party in interest in a contract of sub-agency. The claim of the plaintiffs at this point is that notwithstanding that no general contract had been entered into by the plaintiffs for any particular territory, a special contract was then and there entered into for one customer out of McKinney's territory; that Brown said to Dewar that he had a customer who might buy Canada land; that he would bring such customer to Dewar in time for the next excursion; that Dewar agreed to pay him one and one-half dollars an acre as commission for any of their lands which such customer should buy; that on June 7th following Brown brought his customer, Nugent, to the office of Dewar at Omaha and introduced him as a prospective buyer; that Nugent joined Dewar's excursion and joined

McKinney at Minneapolis and afterwards bought 640 acres of land, whereby the plaintiffs claim a commission of \$960. As against this, it is made to appear for the defendants that Nugent was himself a land agent, or that he desired to be one; that he desired territory as such agent and later procured some; that it was made to appear to McKinney by Brown and by Nugent that Nugent was or would be associated with the plaintiffs and that any arrangement made with Nugent would be satisfactory to the plaintiffs; that Nugent purchased a section of land, but as a condition of such purchase, he insisted upon the allowance of one and one-half dollars an acre out of the purchase price as the equivalent of a commission; that such allowance was made to him. This contention is supported by the testimony of Nugent upon the trial. It has some support also in Brown's letter of introduction of Nugent to McKinney. The foregoing is a sufficient statement of the salient facts pro and con to indicate that the case presented an issue of fact for the jury unless the oral contract sued on was invalid under the Nebraska statute, which was pleaded by the defendants. To this statute, therefore, we direct our attention.

I. The statute relied on is Sec. 10856, Cobbey's Annotated Statutes of Nebraska, and is as follows: "Every contract for the sale of lands, between the owner thereof and any

1. **CONTRACTS:**
validity: law
loci con-
tractus: law
loci rei citae:
 Nebraska Real
 Estate Com-
 mission Act.

broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the

compensation to be allowed by the owner in case of sale by the broker or agent."

This statute has been repeatedly sustained by the Supreme Court of that state. The reasons underlying such statute have been stated by such court as follows:

"The reasons which impelled the legislature to pass that act are well known to the courts and the profession generally.

Innumerable suits were being instituted from time to time by agents and brokers after the owners of land had sold the same, claiming a commission on the ground that they had been instrumental in securing the purchaser; and in many cases the owners of the land were compelled to pay double commission on account of such claim. In order to prevent such disputes, and protect property owners under just such cases as the one we are now considering, the legislature passed this act." *Covey v. Henry*, 98 N. W. (Nebr.) 434.

"The section quoted would seem to be too clear to require interpretation. The undoubted purpose of the legislature was to remedy an evil which had grown up in this state, as shown by innumerable actions brought by real estate brokers against the owners of real estate to enforce the collection of commissions for negotiating sales which in many instances were never completed." *Danielson v. Goebel*, 98 N. W. (Nebr.) 819.

"The foregoing section has been before this court several times and the uniform holding has been that there can be no recovery by a real estate agent or broker on a verbal contract for the sale of real estate." *Barney v. Lasbury*, 107 N. W. (Nebr.) 989.

Similar holdings also have been made by such court in the following cases: *Allen v. Hall*, 89 N. W. (Nebr.) 803; *Spence v. Apley*, 94 N. W. (Nebr.) 109; *Baker v. Gillan*, 94 N. W. (Nebr.) 615; *Blair v. Austin*, 98 N. W. (Nebr.) 1040.

Giving effect to this statute according to its terms, there was no completed and valid contract between Brown and Dewar.

The appellant presents in argument several reasons why such statute should not be deemed as controlling or as applicable to the case and we turn to the consideration of this contention.

II. The first general proposition urged is that this

statute, being analogous to if not a part of the Nebraska statute of frauds, is a remedial statute and is not binding upon the courts of this state. The contract sued on was concededly made at Omaha, Nebraska, and at no other place. It was therefore necessarily a Nebraska contract. If the contract was valid in Nebraska, it must be held valid here. If it was not valid in Nebraska, then there was no contract in Nebraska. If the contract was invalid when and where made, when and where did it become valid? Was the contract rendered valid simply by bringing an action upon it in Iowa? Subject to some exceptions, the general rule is that the validity of a contract in its inception is to be determined by the law of the place of its making. This rule is sustained by the great weight of authority and we are unequivocally committed to it. *Nichols & Shepard Co. v. Marshall*, 108 Iowa 518; *Hazel v. Chicago, M. & St. P. R. Co.*, 82 Iowa 477.

One of the exceptions to this rule is that where the contract involves an interest in real estate, its validity must be determined according to the law of the state where such real estate is situated. This requirement is an incident of the sovereignty of the state and of its necessary jurisdiction over its own domain. Whether the same exception would obtain where the contract involves an interest in specific personal property, we need not inquire. This action is transitory and *in personam* only.

Another exception is that under some circumstances a contract may be entered into in one state to be performed in another state. In such case, if the parties so intended, the validity of the contract will be determined under the law of the state where it is to be performed. An illustration of this exception will be found in *Arnold v. Potter*, 22 Iowa 194. In that case, a promissory note was executed and delivered in Massachusetts by a resident of Iowa as payor to a resident of Massachusetts as payee, whereby the payor agreed to pay 10% interest. This rate was legal in Iowa and usurious in Massachusetts. It was held that it was competent for the

parties under those circumstances in good faith to contract with reference to the law of Iowa and to bind themselves accordingly. Appellant contends for the application of such rule in the case at bar. The argument is that the contract sued on was performed in Canada and that the law of Canada will be presumed to be the same as that of Iowa, in the absence of other proof. The premise of fact, however, is not sustained by the record. Brown's contract, according to his showing, was to furnish a customer. He produced Nugent at Omaha. The agents of the company took him to Canada and there sold him the land. But in buying such land, Nugent was not acting for Brown. He was not performing Brown's contract. Brown had performed his own contract by producing his customer at Omaha. He had fully performed it. Nothing more could be required of him to entitle him to the benefits of his contract. True, his delivery of the customer at Omaha did not necessarily entitle him to his commission. This was not because of any failure of performance on his part but because by the very terms of his contract his commission was still subject to the contingency of a sale by the company to the purchaser. If the contract could be enforced here on the ground thus urged, it could be enforced in Nebraska on the same ground. In the *Arnold* case, *supra*, the validity of the contract was sustained here not on the ground that the courts of Iowa would sustain as valid a contract which was invalid in Massachusetts, but on the theory that it was competent under the circumstances shown for the parties to contract in Massachusetts and to incorporate into their contract the Iowa law as to rate of interest and that such contract was valid not only in Iowa but in Massachusetts as well. What is plain in the case before us is that the plaintiff could not have prevailed therein in the courts of Nebraska. *Osborne v. Dannatt*, 167 Iowa 615.

There is some contention in the argument that the contract in question created an interest in the land within the

meaning of the statute of frauds and that for that reason the law of the place of the land will obtain. It is well settled, however, that an agency contract for the sale of land is not one which affects real estate in the legal sense. *Bannon v. Bean*, 9 Iowa 395; *Goldstein v. Scott*, 78 N. Y. Supp. 736.

2. BROKERS : commissions : statutes of frauds. The case last cited involved a statute of New Jersey similar to the one under consideration herein. It was held that its validity must be determined under the law of New Jersey. It is also urged that performance by the plaintiffs took the case out of the operation of the statute. If the statute had provided that part performance would avoid it, the contention at this point could be conceded. Such proviso is contained in many statutes of fraud as to some subjects. There is no such provision in the statute before us. If there were, it is manifest that it would destroy entirely the real purpose of the statute. No agent sues for a commission except upon the claim that he performed his part. It is true that the Supreme Court of Nebraska has held that if both parties have performed the contract, no question of its validity can thereafter be raised. In such case a promissory note given in settlement for services rendered under an oral contract was held valid. *Mohr v. Rickgauer*, 117 N. W. (Nebr.) 950.

It has also been held by such court that where the contract was mutually recognized and performed, a subsequent action for damages for fraud based upon the fiduciary relation thus created could be maintained. *Latson v. Buck et al.*, 126 N. W. (Nebr.) 760.

It was also held by the same court that a contract established by correspondence of the parties was sufficient to answer the call of the statute. *Holliday v. McWilliams*, 107 N. W. (Nebr.) 578.

These holdings are all consistent with the spirit and manifest purpose of the statute as announced by the same court. The promissory note in the one case and the correspondence in the other gave substance and certainty to the

contract and barred the way to mere invention and perjury. Some reliance is placed by appellant upon the case of *Maul v. Cole*, 144 N. W. (Nebr.) 247. It appeared in that case that an agent acting as such under a mere oral contract deceived and defrauded his principal. She thereafter sued for damages for the fraud. The agent as defendant pleaded that his contract of agency was oral and therefore void. It was held that such plea was not available to him in an action for fraud. It was enough that the agent had assumed to act as such for his principal and while acting as such had deceived her to her injury. The question of the validity of his agency contract was said not to be involved. The charge of fraud was based upon his actual conduct. We see nothing in this case to aid the appellant.

III. Lastly, it is urged by appellants that they proved their contract by the correspondence put in evidence. When this controversy arose, certain correspondence ensued between the plaintiffs and McKinney. Two letters

3. BROKERS:
commissions:
statutes re-
quiring writ-
ten contract:
sufficiency of
evidence.

from McKinney are in evidence and one from Dewar to McKinney. The letters of the plaintiffs are not in the record. It is urged that these letters proved the contract and they are

relied upon under the *Holliday* case, *supra*. Taking the most favorable view of these letters, the most that can be said for them is that they indicate that McKinney had expected to allow the plaintiffs one and one-half dollars an acre and that he had allowed the same to Nugent in the justified belief that this was the understanding between Nugent and the plaintiffs. His liability for such commission is emphatically denied. Omitting this denial, however, it appears from such letters that whatever commission should be paid must be so paid by McKinney. McKinney is not a party defendant. There is nothing in the letters which could be construed as an admission of the liability of either of these defendants. We see no aid, therefore, to the plaintiffs in such correspondence. The plaintiffs would be at some disadvantage at this point if we

were to hold otherwise as to the effect of the letters. They sued upon the oral contract and that alone. In the *Holliday* case the suit was upon an alleged written contract. At the close of the trial, the plaintiffs herein amended their petition and declared upon the written contract. Upon motion of the defendants, this amendment was stricken by the court as having been filed too late. Complaint is made of this ruling. The trial court necessarily had a large discretion at this point. The amendment presented a very material change of issue and no adequate reason is shown why its filing should have been so long delayed. In the view we have already expressed as to the effect of these letters, we need not look farther into the merits of this ruling. We think the trial court ruled correctly in directing the verdict. The judgment is therefore—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

TEANNA E. J. KRETZINGER et al., Appellees, v. S. E. EMERING,
Appellant.

CONTRACTS: Performance—Demanding Benefits—Avoiding Bur-
1 **dens—Vendor and Purchaser.** The burdens of a contract cannot be avoided by one who demands, receives and retains the benefits.

PRINCIPLE APPLIED: Plaintiff sold his land to defendant, agreeing to give possession March 1st, together with merchantable abstract, at which time payment was to be made. On March 1st, the delivery of the deed by plaintiff and the payment by defendant of the amount then due was delayed, owing to some objections to the abstract. But defendant took possession and always thereafter retained the same together with all use and profit thereof. The defects in the abstract were later removed. *Held*, the defendant was liable to plaintiff for interest on the payment withheld.

VENDOR AND PURCHASER: Vendor's Lien—Waiver—Action at
2 **LAW.** One having a vendor's lien may waive the same and sue
at law for the amount due.

INTEREST: Waiver by Accepting Principal. Acceptance of the
3 principal of a debt does not bar an action for unpaid interest,
especially when there was an agreement that the claim for interest
should not be considered waived by the acceptance of the principal
sum.

Appeal from Carroll District Court.—HON. M. E. HUTCHIN-
SON, Judge.

SATURDAY, FEBRUARY 13, 1915.

ACTION at law to recover remainder of the agreed con-
sideration for the sale of land by plaintiffs to defendant.
There was a judgment for plaintiffs and defendant appeals.
The material facts are stated in the opinion.—*Affirmed.*

J. M. Graham and E. A. Wissler, for appellants.

C. C. Browning and Lee & Robb, for appellees.

WEAVER, J.—On August 31, 1910, the plaintiff by written
contract sold and agreed to convey to defendant 120 acres of
land for the sum of \$14,000. Of this sum defendant undertook
to pay \$1,000 upon the execution of the writing and the
remainder upon terms stated as follows:

“Six thousand four hundred (\$6,400) dollars on March
1st, A. D. 1911, and execute back to first parties or such
person as they may direct a purchase money mortgage for
seven thousand (\$7,000) dollars, to bear interest at the rate
of five and one-half per cent per annum, due in five years, but
optional after two years, and it is also understood and agreed
that second party may have the option of paying all cash on
the first day of March A. D. 1911, by giving written notice

thereof 30 days before, and should it become necessary to enforce the conditions of this contract by law the second party is to pay the interest on the whole amount from the date hereof at five and one-half per cent per annum, and a reasonable sum shall be taxed as attorney's fees and added to the costs.

"It is agreed by the parties hereto that possession is to be given on March 1st, A. D. 1911, and on final payment and execution of the mortgage on said date to deliver a good and sufficient Warranty Deed and Abstract showing merchantable title to said lands, principal and interest in all cases payable at First National Bank in Coon Rapids, Iowa."

On March 1, 1911, defendant took possession of the property, which he has ever since retained. About the same time, the plaintiffs executed a deed to the defendant, but the same was not delivered because of certain objections raised to the sufficiency of the accompanying abstract of title. The matter of completing the abstract was delayed until about September 12, 1911, when a final settlement was attempted and effected except as to the item of interest claimed by plaintiffs on the payment of \$6,400, which was to have been made on March 1st of that year. This interest, defendant refused to pay on the theory that the delay in payment beyond the date named in the contract had been caused by failure of plaintiffs to perform their agreement to provide an abstract showing a merchantable title and he had not himself been in default with reference thereto. Having reduced their matters of difference to this one item, defendant paid or made satisfactory settlement for the entire principal of the unpaid purchase price, in witness of which the parties entered into a written acknowledgment thereof, and among other things stipulated that such settlement should not be construed as a waiver or satisfaction of the demand for interest. Thereafter, this action was begun by the plaintiff to recover the amount of said omitted item. Trial was had in the district court and the evidence offered by

the parties showing the facts as above stated to be without dispute, the court directed verdict for the plaintiff for \$192.00, and judgment was entered accordingly.

I. The legal propositions advanced by appellant that to entitle the party to a contract to recover for its breach, he is ordinarily required to show performance or tender a performance on his own part, and that in a con-

tract for sale of land, the conveyance by the one party and payment by the other of the purchase price are ordinarily concurrent acts and the promises are dependent rather than

independent, may be admitted to be correct, without requiring us to hold there was any error in directing a verdict for plaintiff. When settlement day arrived, March 1, 1911, and the abstract of title presented by the plaintiffs was alleged to be defective, it was the defendant's privilege under his contract to stand upon all his technical and legal rights, and inform plaintiffs he would go no further until they had performed or were ready and willing to perform on their part. He could have rescinded and declared the contract at an end, or he could have waited with what patience he could command for whatever length of time was required to perfect the formal showing of title, and until that was made, he could not be placed in default, and no interest upon the purchase price would accrue. But this he did not do. Evidently assuming, what appears to have been the fact, that plaintiffs were the real owners of the land and had the right to sell and convey it and that the defects in the abstract of title were technical and formal only and could be remedied within a reasonable time, he went into possession without delay and enjoyed the use and profits of the land from that day without interruption during all the time until the question of title was settled to his satisfaction and the conveyance accepted by him. He took possession of the land and occupied it as his own. He was there neither as tenant nor servant of anyone, but as proprietor, and his right of proprietorship was necessarily grounded upon the

1. CONTRACTS:
performance:
demanding
benefits:
avoiding bur-
dens: vendor
and purchaser.

purchase. While thus in possession, had plaintiff brought suit to recover the amount of the March payment, it is possible, though we do not now so decide, that he might have had the defense or counterclaim to the extent of the reasonable cost of perfecting the record title, but quite certainly no farther. *Hounchin v. Salyards*, 155 Iowa 608; *Worley v. Nethercott*, 91 Cal. 512; *McIndoe v. Norman*, 26 Wis. 588; *Sill v. Burgess*, 134 Ill. App. 373; *Pomeroy's Specific Performance*, 1st Ed. 428, 429.

The argument put forward, that it works an injustice or hardship upon the appellant to require him to pay over his money and rely for reimbursement of the expense incurred in perfecting the record title upon the sellers, who may be insolvent, or non-resident, thus making the remedy so provided wholly ineffective, is beside the mark. Neither the law nor the courts force the appellant into such a position. As we have already pointed out, he did not avail himself of his right to stop at the threshold, and rescind or await plaintiff's performance of their undertaking, but upon faith that they would perform within a reasonable time, he went into possession, thus waiving his right to retain the cash payment, pending such performance. The result shows that his faith was well founded and within about six months the title was made satisfactory to him without any expense on his part. He has had and received everything, including possession from the outset, to which in law or equity he would have been entitled, had plaintiffs been ready with their completed abstract of title promptly on the settlement day named in the contract. He has had the value of the use of the money withheld by him and he has had the use of the land for an entire season to which, without plaintiffs' consent, he had no legal or contract right until he paid the agreed cash instalment. Yet with the earnings of the money and the earnings of the land both in his hands, he proposes to keep them all and account to plaintiffs for no more than the principal sum of his debt. There is no principle of law which will permit it. It would

be a grave reproach upon our system of legal justice were such a result possible.

II. Counsel for appellant seem to concede that payment of this interest might have been enforced in an action at equity but contend that a recovery cannot be had at law.

2. VENDOR AND
PURCHASER:
vendor's lien:
waiver: ac-
tion at law.

We are unable to see how this can be. The debt, if one existed at all, is upon an express or implied promise to pay, a simple legal obligation. If plaintiffs had any right to a con-

tract lien or vendor's lien therefor, it was competent for them to waive and sue at law. There is nothing in the nature of the case requiring or suggesting the need of any other relief than such as is effectuated through a judgment in ordinary proceedings.

III. Defendant makes the further point that the principal sum of six thousand four hundred dollars having been fully paid, action will not lie for the recovery of the interest. If

3. INTEREST:
waiver by ac-
cepting prin-
cipal.

the rule so relied upon has ever been recognized, we think it has never been applied to a claim for interest upon a debt due by a con-

tract, express or implied. Certainly this must be true, where when the amount of the principal debt is paid it is expressly agreed and stipulated by the parties, as was done in this case, that payment and receipt of the principal sum shall not be held to operate as a waiver of the right to collect interest. See *Grote v. New York*, 82 N. E. 1088.

What we have said governs all other material questions argued by counsel and we find nothing in any of them requiring a reversal of the judgment below. For the reasons stated, the judgment of the district court is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

OLIVE L. DANIELS et al., Appellees, v. PHEBE BUTLER et al., Appellees, and ERNEST LEWIS, Defendant, Appellant.

APPEAL AND ERROR: Perfecting Appeal—Notice on Nominal

- 1 **Party—When Not Necessary.** Notice of appeal need not necessarily be served on every person who, on the face of the record, is a party to the action. (Sec. 4114, Sup. Code, 1913.)

PRINCIPLE APPLIED: Action for partition. A party intervened alleging that he had a judgment against two of the defendants, a husband and wife, but that a discrepancy existed in the names of the defendants as they appeared in the judgment. Intervener asked that the judgment be reformed so as to correctly state the names and that the judgment be declared a lien on the defendants' interest. One defendant (appellant on appeal) denied this petition. No notice of the intervention was served on other parties and no one else appeared or pleaded thereto. Intervener on the trial introduced neither judgment nor evidence on his claim. The decree ignored the intervention, neither granting nor denying intervener any relief. Intervener did not appeal. *Held*, notice of appeal need not be served on intervener.

APPEAL AND ERROR: Preserving Evidence—Copying Certificate

- 2 **to Notes—Reversing Title—Effect.** That the evidence has not been properly preserved cannot be predicated on a mere clerical error of the official shorthand reporter which misleads no one.

PRINCIPLE APPLIED: A certificate of the judge and reporter, under the correct title of the cause, was properly attached to the "notes" at the close of the trial and proper filing was made. The reporter in making his translation copied this certificate showing the correct number of the case but inadvertently reversed the names of plaintiff and defendant in the certificate. The volume of the transcript in which this certificate was incorrectly copied correctly gave the title of the cause. The certificate of the reporter to the translation correctly titled the cause. *Held*, error was harmless.

APPEAL AND ERROR: Equitable Action—Transcript—By Whom

- 3 **Certified.** The reporter alone need certify to the transcript of the evidence in an equitable action.

APPEAL AND ERROR: Transcript of Evidence—Division into Sev-

- 4 **eral Volumes—Certificate to One Volume Only.** The certificate of the shorthand reporter to the transcript of his "notes" need

not be attached to each and every part of such transcript into which it may be divided for convenience in handling.

PRINCIPLE APPLIED: The "notes" were properly certified to by the judge and reporter and timely filing made. In preparing transcript of the testimony the pages were consecutively numbered from 1 to 443. For convenience the reporter divided this into four volumes. He also prepared volume 5, composed wholly of exhibits referred to and identified in the preceding four volumes. His certificate, full and comprehensive, made no specific reference to the several volumes, and was attached to volume 4 only. *Held*, sufficient.

ADOPTION: Contract for—Degree of Proof—Equity—Specific Performance. An estate may be disposed of by contract, oral or written. Such contracts usually take the form of contracts of adoption insufficient to meet the formalities of statutory adoption yet enforceable in equity. To establish such a contract a mere preponderance of evidence is not sufficient. Evidence reviewed and *held* not to establish the contract alleged.

EVIDENCE: Letters to Adversary—Secondary Evidence of—Notice to Produce. "Notice to produce" is essential to the introduction of secondary evidence of the contents of letters written and sent to the ancestor under whom the party against whom the secondary evidence is offered claims.

CONTRACTS: Contract to Will and Bequeath—Evidence—Sufficiency. Evidence reviewed and held sufficient to establish a contract "to will and bequeath real estate."

EVIDENCE: Transactions with Deceased—What Is Not—Opinion on Handwriting. One incompetent to testify to a personal transaction with deceased may be perfectly competent to give his opinion as to the handwriting of deceased. (Sec. 4604, Code.)

Appeal from Taylor District Court.—HON. THOMAS L. MAXWELL, Judge.

THURSDAY, NOVEMBER 5, 1914.

REHEARING DENIED MONDAY, FEBRUARY 15, 1915.

ACTION in equity for partition of land. Defendant, Ernest Lewis, filed an answer and cross-petition, alleging that he had been adopted by deceased and was entitled to all the

property. He also claimed to be the owner of 420 of the 460 acres of land by virtue of certain written contracts, which contracts the other parties allege were forgeries. The trial court found against Lewis and dismissed his cross-petition, and he appeals. The facts are more fully stated in the opinion.—*Affirmed in part, and Reversed in part.*

McCoun & Brant, G. B. Haddock and Parker, Parrish & Müller, for Ernest Lewis, appellant.

Crum, Jaqua & Crum, W. N. Jackson and Frank Wisdom, for appellees.

PRESTON, J.—1. Appellees' motion to strike abstract and to dismiss the appeal will be first considered. One ground of the motion is that no notice of appeal was served upon

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|---|--|
| 1. APPEAL AND ERROR: perfecting appeal: notice on nominal party: when not necessary. | J. F. Chiles, intervener, and it is claimed that if the case is reversed he would be deprived of his lien without an opportunity to be heard in this court. In the petition of intervention, |
|---|--|

Chiles alleged that he had a judgment for forty-five and 68/100 dollars against defendant, R. B. Widner, and Amelia Widner, his wife. That his judgment as rendered was against them as Rose Widner and Mrs. Rose Widner; that Rose Widner and defendant, R. B. Widner, is one and the same person, and Mrs. Rose Widner and defendant Amelia Widner is the same person. The prayer is, that the judgment be reformed so as to correctly state their names, and that the judgment be declared a lien upon the interest of said defendants. Appellant Lewis denied the allegations of the intervener. At the trial, intervener did not introduce any evidence, nor did he introduce the judgment. No notice of the intervention was served on other parties, and they did not appear or plead thereto. The judgment was not reformed. No relief was granted or denied intervener. This matter is not referred to in the decree. If Chiles had a judgment, it would be a lien by operation of law, and it was not necessary

to intervene for that purpose. But, as stated, they asked a reformation, as well as the establishment of the alleged lien. Intervener has not appealed from the failure of the court to grant him the relief asked. He seems to have abandoned his petition of intervention. Under such circumstances, so far as the contention between cross-petitioner Lewis and the heirs is concerned, it is the same as though he had not filed his petition, and his rights cannot be affected one way or the other by an affirmance or by a reversal of the case here. It does not appear that he has any rights or judgment or lien, because the allegations of his intervention were denied and he offered no proof.

2. It is contended by appellees that the evidence has not been properly preserved. The certificate of the judge and reporter was attached to the reporter's notes and filed in the clerk's office at the close of the trial. In copy-

2. APPEAL AND
ERROR: pre-
serving evi-
dence: copying
certificate to
notes: revers-
ing title:
effect.

ing this certificate in his translation of the notes, the title of the case was written in a printed form of certificate used as—Phebe Butler et al., Plaintiffs, v. Olive L. Daniels,

et al. It should have read—Olive L. Daniels et al., Plaintiffs, v. Phebe Butler et al. This was evidently a mistake by the reporter in copying. The title of the case was correctly given in the original certificate, and the volume of the transcript in which this certificate is erroneously copied correctly gives the title of the case. The correct number of the case is 7559, and this number appears in the title in which the reporter erroneously reversed the names in copying in the transcript the certificate to the shorthand notes.

3. APPEAL AND
ERROR: equit-
able action:
transcript: by
whom certified.

The transcript made by the reporter was, within the proper time, certified by him, but not by the judge. It was not necessary that the judge sign such certificate. *Merrill v.*

Bowe, 69 Iowa, 653.

The amendment to Sec. 3652 of the Code makes no change in respect to this. In this certificate of the reporter, he certifies that:

"By direction of the court, I made the official report of Olive L. Daniels v. Phebe Butler et al., tried at said term aforesaid, the Hon. Thomas L. Maxwell being the sole presiding Judge; that I made the official report of said case in accordance with Sec. 3675 of the Code of Iowa, and that said official report, with the certificate of the trial Judge and official reporter, was filed with the Clerk of said Court, attached to the shorthand notes, on December 21, 1912.

"I further certify that the within and foregoing is a full true and complete extension of the evidence offered, adduced or introduced upon the trial of said cause; that it contains a full, true and complete extension of all agreements, as well as all objections to the testimony, the rulings of the court upon the same, and the exceptions at the time taken and preserved by counsel; that it fully identifies all exhibits offered, adduced or introduced upon said trial, and that, together with the exhibits therein referred to and identified, constitutes all the evidence offered, adduced or introduced upon the trial of said cause, and constitutes the official transcript of the testimony therein."

This is dated and signed by the reporter. The title of the case is correctly given in this certificate. The mistake of the reporter in copying the certificate in the transcript is clearly a clerical error and could not have misled anyone. The volume of the transcript itself purports to be evidence used in the trial of this case.

Another ground of the motion is that the certificate as to the evidence was attached to only one volume of the long-hand extension of the reporter's notes, while the evidence as thus extended was contained in five such volumes of transcript. It seems that, for convenience of handling the transcript of evidence, it was divided into five volumes. Volume 5 consists of exhibits offered during the trial. The other four volumes begin with page 1 and are consecutively numbered through said four

4. APPEAL AND
ERROR: trans-
cript of evi-
dence: di-
vision into
several vol-
umes: certifi-
cate to one
volume only.

volumes, ending with page 443 as the last page in Volume 4. The certificate of the reporter is attached to said Volume 4, instead of being attached to each volume and to the volume of exhibits. The title of the case is correctly given at the beginning of Volume 1 and also in the certificate at the end of Volume 4. As before stated, the shorthand notes were properly certified to by the judge and reporter, and the transcript is properly certified to by the reporter. It is a matter now of identification of the evidence after a proper certification. In our opinion, this was sufficiently done in this case under the statute. We are of opinion that it was not necessary to attach a certificate to each volume. Volume 5, as stated, consisted of the exhibits offered on the trial, which were properly identified by the reporter and referred to in the first four volumes. This being so, it was not necessary, although perhaps it would have been better practice, to put the certificate at the end of Volume 5. We think the motion should be, and it is, overruled.

4. The defendant, Ernest Lewis, by his answer and cross-petition, alleges, substantially, that he is the owner of the real estate in question as the adopted son of deceased, A. J.

5. **ADOPTION:** Litteer, pursuant to a contract of adoption
contract for: between his parents and said Litteer, whereby
degree of proof: equity: Litteer bound himself to leave his estate to
specific performance. Lewis as sole heir. It is not claimed that there was a completed, formal adoption, but the claim is that such a contract was made in parol and by correspondence. In other counts of the answer and cross-petition, he claims to be the owner of 420 acres of the land in controversy under the terms and conditions of two written instruments declared upon by him and known in the records as Exhibits One and Two. He alleges that he has performed his part of such agreements.

The questions presented are very largely, indeed, almost entirely, of fact. Many witnesses were examined, and the abstract is voluminous; elaborate arguments have been made,

and the case has been carefully and ably presented. It will be impractical to review the evidence in detail. We shall attempt to briefly state the evidence, or the more important points, and our conclusions. It does not follow that, because the evidence is not set out more in detail, it has not all been considered. The case involves a considerable amount of property and is of importance to the litigants. The record has been read and studied with the care required in such a case.

First, as to the alleged contract of adoption. That such a contract as alleged may be enforced if the evidence is sufficient under the rule in such cases has been decided in *Stiles v. Breed*, 151 Iowa 86, 91; *Chehak v. Battles*, 133 Iowa 107, 117.

The rule as to the quality and quantity of proof required is stated in the *Stiles* case. Some of the cases say that the terms and character of such a contract must be established by evidence so clear and forcible as to leave no reasonable doubt in the mind of the Chancellor. We apprehend this does not mean beyond all reasonable doubt as in a criminal case. A mere preponderance of the evidence is not enough, but it must be so clear and satisfactory as to convince the mind. As some of the cases put it, under similar circumstances, where one of the parties is dead and unable to give his version of the matter, and the heirs are necessarily limited to collateral facts and circumstances and to matters affecting the credibility of the witnesses, we are not compelled to believe a witness simply because he testifies to the contract, but that such testimony, often given by interested witnesses, should be closely scanned, and must be tested by its own inherent probability or improbability, and by ordinary rules of human conduct under similar circumstances. We are not intending to relax the rule.

Before going into the evidence as to the alleged contract of adoption, it may not be out of place to refer to the situation in a general way and the relations between Lewis, and deceased and his wife. Some of these circumstances have a

bearing, also, upon the other branch of the case in regard to the written contracts, Exhibits One and Two. It appears that defendant Lewis left the home of his parents in Kansas in 1891, when he was sixteen years of age, and came to the home of deceased, whose wife was an aunt of Lewis. Litteer and wife were childless. Before this they had taken other children to raise and educate, but such children did not suit Litteer and they had left his home. After Lewis came he went to school, did chores, made garden, and the like. Later, he taught school some months, still making his home at Litteer's. In 1901, when Lewis was twenty-six years of age, he was married and moved on the 420 acre farm now in dispute and remained on the farm, under different arrangements, until the death of Litteer. Deceased was pleased with Lewis; appeared to have confidence in him. Their relations were friendly, except that there is some claim that some years before Litteer's death there was some disagreement as to the settlement of the partnership which existed between them part of the time Lewis occupied the farm. But it is not claimed that there was any serious difficulty at this time. Lewis continued to occupy the farm, and the relations between them were friendly. Lewis occupied the farm some of these years under verbal leases; some years there were written leases, others, a partnership; and at the last, as Lewis now claims, under the written contracts One and Two later referred to.

A. J. Litteer, aged about eighty-two, died about January 20, 1912, seized in fee simple of the real estate described in the pleadings. His wife died about a month before, or on December 18, 1911. He left no will which has been discovered, although there is some claim in the testimony that he said he had made a will. He left surviving him one sister, Phoebe Butler, and a number of nieces and nephews as his only heirs, who are all parties to this suit, either as plaintiffs or defendants. The day before his death he conveyed his homestead property in Bedford, consisting of seven acres of land, to his

nephew, John Widner. At the time of his death he owned 240 acres of land in Kansas, in addition to the 460 acres described in the petition. A partition suit was brought in Kansas and the 240 acres of land there were ordered sold in 1912, but the funds remain in the hands of the court. Deceased left notes in the sum of about \$7,000.00, which were in the possession of Lewis, and not indorsed; the administrator secured an order for the examination of Lewis for the purpose of discovering assets. The scope of that examination extended, perhaps, beyond the contemplation of the statute, and inquiry was made of him in regard to the real estate and his relations with deceased. Some of the statements then made are alleged by appellees to be contradictory to the testimony and claim now made by Lewis, and inconsistent with his present claim.

Appellant's claim is that the adoption contract was made about the time he came to the Litteer home in 1891. The father of Lewis testifies that he went from Kansas to Bedford in response to a letter from Litteer, suggesting that he rent the Iowa farm. The father did not rent the farm because, as he says, when he arrived at Litteer's home, Litteer's main object was to get one of Lewis's boys to adopt.

The trial court, in a written opinion, found that the alleged contract of adoption had not been established by the requisite amount of proof, saying:

"The only witness who attempts to testify to the agreement, and the person with whom it is claimed the agreement was made, is the witness, Henry Lewis, the father of cross-petitioner, Ernest Lewis. His testimony is presented by deposition. His testimony, as presented, is, that there was some talk between him and A. J. Litteer in August, 1891, in regard to the boy, Ernest Lewis, who had, without consent of his parents, left his home in Kansas and gone to his uncle and aunt, the Litteers. The witness says it was agreed that the Litteers should have Ernest and adopt him as their own child and leave him all their property. It is shown, however, at the time his

deposition was taken he was very old, his memory must have been more or less enfeebled, and it further appears that at the time the alleged agreement was made the witness was so deaf that it was almost impossible to carry on a conversation with him. He says that when he was at his sister's house in 1891, and the conversation occurred in regard to the adoption of the boy, that he was without his ear trumpet and used his sister's, Mrs. Litteer's, who, he says, was still deafer than himself. We have no doubt from the evidence that the Litteers desired to have the boy, Ernest, live with them, and they were glad and willing to furnish him a home, send him to school and care for him, as they did do; but I am not satisfied from the evidence that they ever intended, or that they ever agreed, to adopt him and make him their heir. . . . In fact, his own conduct, as well as the conduct of the Litteers, has been inconsistent with such an understanding or agreement."

We agree in the main with the trial court as to the testimony of Henry Lewis. There are some other circumstances on the cross-examination tending to weaken his testimony, which the trial court did not refer to. Neither shall we refer to all such circumstances.

He testified that his son Ernest was close to twenty years old at the time of the alleged adoption; that Ernest was sixteen years old when he left his father's house, but the witness says to the best of his knowledge it was in 1891 that he had the talk with Litteer. He says they had but one talk about it. The witness says he has no recollection about when he moved to Iowa, which, according to the testimony of other witnesses, was in 1896. He says that his sister, Mrs. Litteer, was so deaf he could not talk to her, and her voice was so weak he could not hear it. He was eighty-five years of age at the time he testified. He testified further:

"I never told anybody, I never told a soul; I don't publish my family to the world, that you must understand. I

was raised a Quaker and, by Jesus Christ, I am honest. I get excited sometimes. I have a pretty excitable temper. When I was young I wouldn't allow no man to doubt my word."

We cannot quite agree with the trial court in the statement that Henry Lewis is the only one who attempts to testify to the agreement, etc. We think there is other evidence on the subject and will now briefly refer to it.

Perhaps we should state a little more fully the evidence of Henry Lewis before referring to the other evidence. He testified further that Litteer was at his home in Kansas in 1899 and talked about the matter of adoption; that in August, 1891, in response to a letter from Litteer, suggesting that Lewis should rent the farm in Iowa, Lewis visited the Litteers in Iowa, but did not rent the farm, saying that when he got to Iowa he found "Litteer's object was to get one of my boys to adopt. He didn't seem to want to rent me the farm. At that time Litteer made a proposition if I would let him adopt Ernest he would give him a good education and at their death would leave him everything they had." That he told Litteer he considered the proposition all right, if his wife was willing, and that it was a part of the agreement that he should get his wife's consent; that when he got back home he stated the proposition to his wife, who said it was all right. He testifies further:

"My wife wrote Litteer that she was satisfied with what I had done. We got a reply to that letter. I do not know where it is. I made a search for it, but could not find it. Mr. Litteer's reply was that he was satisfied with the agreement I had made with him. The letter said that she (Mrs. Litteer) was satisfied with the agreement made. He (Litteer) was not much of a writer, and she (Mrs. Litteer) done all the writing, and probably he told her to write, and I expect she wrote it."

In 1896, this witness moved to Taylor County, and says that, "Litteer said he did not want me to advise Ernest in any way. He considered him his boy and if he had to have advice he would give it." That after this agreement with Litteer witness never bought clothes or books or paid any expense for Ernest Lewis.

As to these alleged letters, no notice to produce was served as to those claimed to have been written to Litteer, and as to these and some of the others there was no sufficient foundation laid to permit secondary evidence. The evidence was all objected to by proper and timely objection, and this is true as to the competency of witnesses under Sec. 4604 of the statute.

6. EVIDENCE:
letters to
adversary:
secondary evi-
dence of:
notice to
produce.

Mrs. Léwis, the mother of appellant, testifies that prior to 1891 Litteer and his wife visited them in Kansas three or four times; that there was always some talk about them adopting a child; that her husband, Henry Lewis, visited Bedford, Iowa, during August, 1891; that upon his return he stated that an agreement had been made with Litteer that he was to have one of the boys. She says:

"My son John and my daughter Ida stayed at Litteer's one year and went to school. They provided for them while they were there and sent them to school and furnished all things necessary, and it was after that that they wanted John to come and stay with them. It was about 1890. The circumstance of my son Ernie leaving home in 1891 was that he just went. That was the circumstance. I did not have any knowledge at that time when he went."

She also says that after 1891 Ernest remained at the Litteer home and that nothing was collected for Ernest's services while he was at Litteer's; says while they lived on the farm in Iowa she heard Mr. Litteer tell her husband that Ernest was his boy now and he didn't need to give Ernest

any orders. She also testifies substantially as her husband in regard to the letters. Her evidence, taken all together, is indefinite and does not, we think, clearly and specifically refer to the adoption of Ernest.

Appellant himself testified in regard to the conversation between Litteer and Henry Lewis, but we are not satisfied from the record that he did not take part in the conversation, and we think he was incompetent as a witness as to much of his testimony.

Meek testifies that when the boy, Ernest Lewis, would come into Meek's store after school, Litteer remarked on different occasions, in substance:

"Well, Alex, I have got a boy and I have a notion to adopt him. Mr. Litteer told me he had wrote to Mr. Lewis (Sr.) to come out here and he would try to rent him his farm, but that Litteer said, 'Really what I want him to come out here for is for the purpose of getting his consent to adopt this boy.'"

That at Mr. Litteer's house, in the presence of Lewis, Sr., Litteer said to the witness:

"Alex, Mr. Lewis and I are going to make a deal. I am going to take this boy and keep him, provided his wife gives her consent. Now that is about all I remember of being said."

Meek further testifies that Litteer's mail and his own came in the same post-office box; that he personally knows that about two weeks after Lewis, Sr., went home, a letter came from Kansas addressed to Mrs. Litteer; that Mr. Litteer went back to the desk in Meek's store and got the letter and walked up to the bench where Meek was at work, saying:

"Well, Alex, I have got an answer to the proposition that I made to Mr. and Mrs. Lewis concerning the boy. It is in this letter. The answer is all right. Mr. Litteer told me

frequently that they intended to adopt Ernie as their son. After he had closed this deal in Kansas Mr. Litteer always in my presence called him his boy."

He also says that in August, 1911, he and Litteer had the following conversation:

"I asked him at that time why it was he had never went on and completed the adoption of Ernest Lewis, and he told me that it had just been neglected carelessly, but he thought the thing was just as well as though he had had the adoption papers made out."

The witness is contradicted to some extent by the administrator. He admits a conversation with the administrator, and says he did not tell the administrator, in response to his questions, about the things he had testified to because Litteer on his death bed had made witness a present of a horse and buggy, and that some of the heirs objected to his having it, and the administrator also, and that they tried to bully him and that he got riled up about it. He admits his memory is somewhat defective.

A part of the testimony of this witness indicates a future purpose to adopt, and is possibly consistent with the theory of adoption, yet it is equally consistent with the theory that Litteer was going to help appellant without adoption and compensate him by gift or in some other way. Some of these conversations in which the witness claims Litteer said he was going to adopt were after the time when the alleged contract of adoption was made.

Witness Harvey testified that Litteer had made him a loan of money, and that Litteer said, in the presence of appellant, in regard to the interest, that he (Litteer) might die before three years, and that if he was not here at the end of that time Lewis would look after it. That in the conversation he eulogized Lewis; said he considered him his own boy, and that if anything happened the note could be paid to

Lewis; and in another conversation Litteer said that Lewis could attend to insurance on the barn; that it would fall to Lewis anyway. The first of these conversations was in June, 1911.

Witness Osborn testified as to a conversation with Litteer in December, 1910, in which Litteer said that he had taken Lewis to do what was right by him; that after Lewis graduated he had taught school and married, and that then he had put Lewis out on his farm; that he had educated three or four other children, and that Ernest Lewis was the only one that ever stayed by him; that he had told Lewis that he wanted him to do what was fair and straight there and he would give the farm to Ernest Lewis, and said: "In fact, I have a contract to that effect." This was after the execution of Exhibits One and Two, and could, and probably did, refer to the contract rather than to adoption. This witness also testifies that Litteer never referred to Lewis as his boy to him.

Lacey testifies that Litteer told him: "I am giving that boy a good chance; that boy has been in the family, adapted to the family.

Q. "Adapted?"

A. "Yes."

Says also that in a conversation in July, 1911, Litteer said that Lewis was going to stay on the place and rent the farm, and eventually he thought Lewis would get the proceeds of the farm.

Hough testified to conversations between himself and Litteer, in which the latter said, referring to Lewis, that he (Litteer) thought it would be better to leave the management of the farm to the boy; that he would have to learn, and he might as well learn one time as another; that at one time Litteer asked witness, "How is my boy getting along up on the place?"

Hanshaw testifies to a conversation in 1910 on the Litteer farm, in which Litteer said:

"Ernest has been with me and helped to make money in his deals. He has been with me a long while, and when I am done with this property I have here I intend to see that he loses nothing by it."

Alfred Lewis, a brother of appellant, testifies to hearing his father and mother discussing the question of the adoption of appellant by Litteer. This was not in the presence of Litteer. The witness says:

"I have heard A. J. Litteer say that he had adopted Ernest as his son and considered him as such, and that he should have his property; have heard him say that my father and mother consented to the adoption."

Ida Carver, a sister of appellant, gave similar evidence as to conversations between the father and mother of appellant after the father's return from Litteer's in 1891. That Litteer often asked the witness what she thought of his boy, referring to Ernest, and that he always seemed to take a great interest in him.

Some of the heirs, as witnesses, testified to statements by deceased, but we think they were incompetent to testify. Testimony was offered by appellees tending to show conduct and statements of some of appellant's witnesses somewhat inconsistent with their evidence. We shall refer to some of the circumstances tending, we think, to show that the conduct of appellant has been inconsistent with his present claim as to the adoption.

In his answer first filed he relied on the written contracts, One and Two, hereafter discussed, but did not plead the adoption. He explains this by saying that his attorneys who were then managing his case advised him that he did not have sufficient evidence to establish that claim. There are some matters in connection with this which make the explanation unsatisfactory. Appellant had knowledge of the partition proceedings in Kansas for the sale of the Kansas land

soon after the death of Litteer, but made no objection thereto. The Kansas land consisted of 240 acres, of the value of about \$50.00 per acre.

The contents of Exhibits One and Two, hereafter set out, seem to negative the idea of adoption, while there is one clause therein which by itself might be said to corroborate to some extent that theory. This is the reference in the contracts to the Litteers' considering him their son, but these contracts are not of themselves sufficient as an adoption and are not so claimed by counsel. The contracts are specific as to the 420 acre farm. This bears out the theory that, though deceased may have had the notion at times of formally adopting appellant in legal form, he did not do so, and that he expected to "do what was right by Lewis," as he stated to some of the witnesses, but that this was to be done in his own and in some other way than by adoption.

There are other circumstances in the record not detailed, but we have intended to refer to the substance of the more important testimony. While it must be admitted that the evidence tends to show that there was a contract of adoption, yet, taking into consideration the nature of the case, the fact that Litteer is dead, and the difficulty for the heirs to meet by affirmative proof the evidence on behalf of appellant, and considering all the facts and circumstances in the case, we conclude that appellant has not established his claim at this point by that clear and convincing proof required under the rule in such cases.

5. Appellant contends that, regardless of the rights of the cross-petitioner, under the alleged agreement to adopt, he is entitled, under the contracts, Exhibits One and Two, to the relief sought as to the 420 acre farm of which Litteer died seized. Exhibit One, which has been referred to, which appellant claims and we find he has performed on his

7. CONTRACT:
contract to
will and
bequeath:
evidence:
sufficiency.

part, is as follows:

"Conway, Iowa, September 16th, 1910.

"Contract and Article of Agreement, between A. J. Litteer and Mary L. Litteer parties of the first part and Ernest Lewis party of the second part, agree and enter into the following: We, A. J. Litteer and wife, parties of the first part agree to give, will and bequeath at the death of the last one of us living our farm of 420 acres known as the A. J. Litteer farm one and one-half miles South of Conway, 260 acres being in Clayton Township and 160 acres being in Marshall Township, Taylor County, Iowa, to said party of the second part Ernest Lewis our nephew, we considering said second party an heir as though he were our son by blood and birth, farm to be as described according to Plat Book of Taylor County, Iowa. For and in consideration of which the said second party agrees to pay an allowance of Twelve Hundred Dollars per year to said first parties during their lifetime or the lifetime of either of them. The said second party further agrees to take same care of said first parties should they or either of them become enfeebled in mind or body as though they were his own parents by blood. This contract to be in full effect from date. Parties of the first part: A. J. Litteer, Mary L. Litteer; Second Party: Ernest Lewis. Witnesses: Claude Johnston. J. B. Dant."

Exhibit Two, which appellant contends is supplemental to Exhibit One, is like it, except that the land is particularly described. It is dated September 24, 1910, and the only purpose seems to have been to give a description of the land.

Appellees question the genuineness of the signatures to both these instruments. The substance of the finding of the trial court as to these contracts is:

"It must be and it is conceded that if A. J. Litteer executed these writings, Exhibits One and Two, then the cross-petitioner is entitled to the 420 acres in question. Unfortunately for the cross-petitioner, the facts and circum-

stances shown by the evidence, and the conduct of both the deceased and the cross-petitioner, from and after the date of these instruments up to the death of deceased, are inconsistent with the claim now made by cross-petitioner. This very important document, Exhibit Two, is claimed to have been made as an instrument of final and permanent character. But the fact that it was made without the presence of any person is a circumstance within itself that makes it look unusual and peculiar. . . . It is claimed that at the time Exhibit Two was executed a duplicate copy of the same was executed, and that was left with the deceased. The history of his business life indicates that all of his important papers were found among his papers or effects. The genuineness of the signature attached to said instrument is disputed, and certain expert witnesses called pronounced it spurious. The cross-petitioner also offered an expert upon handwriting who gives it as his opinion that the signature is genuine. I have become satisfied that the name attached to Exhibit Two is not the genuine signature of A. J. Litteer. As to the genuineness of the signature to the document, Exhibit One, I am not as well satisfied, but, in the light of all the evidence, I have reached the conclusion that neither of these documents are genuine. It would serve no good purpose to point out the various facts and circumstances shown by the evidence, which lead me, most reluctantly, I admit, to this conclusion."

The court seems not to have been entirely satisfied that Exhibit One is not genuine. Appellees have the burden as to the question of forgery. The evidence is directed more to Exhibit One, as are the arguments, doubtless on the theory that it is the key to or basis of, the other, and if that is found to be a forgery it would be more probable that Exhibit Two is not genuine. If Exhibit One is genuine, it is not improbable that Two is also genuine because the only purpose of Two is to give a technical description of the 420 acres, and if One is genuine the only object in the making of Two would be

to carry out the plan of the deceased. There is not as much evidence tending to show that Two is spurious or to sustain its genuineness as there is to the first writing. It appears to us there was no real necessity for Exhibit Two. The description of the land in Exhibit One is such that it could be made certain and was sufficient in itself without the other writing.

As to the papers of deceased, the property in which Litteer died had been deeded by him to one of the heirs, and after Litteer's death was in control of some of them. The administrator was not appointed for three or four days. There were meetings of the heirs in this property; others had access to the papers. Lewis was present part of the time, but not always, when the papers were being examined. It appears that there were, as one witness puts it, two or three bushels of old papers, and they were examined and some thrown on the floor.

Widner, one of the appellees, claims that deceased told him, some time before his death, that he had some papers put away in the ground in the garden in a stone churn. A search was made by the administrator and others for this churn, but it was not discovered.

We shall take up first the evidence as to Exhibit One. As to this, as on the question of adoption, we shall treat the matter as best we may without going fully into details. Exhibits One and Two, with other writings containing admitted signatures of Litteer, and enlarged photographs of the different signatures, have been certified. After a careful comparison and a study of the signatures, in connection with the testimony of the experts, the facts which corroborate the genuineness of the signatures, the circumstances shown which are claimed to be against that theory, the situation and relations of the parties, the probability that Litteer desired to make some such arrangement, and after a careful examination of all the facts and circumstances shown, we conclude that appellees have not sustained their claims that Exhibits One and

Two are forgeries. To our mind, appellant has clearly a preponderance of the evidence on this issue.

Appellees contend that the circumstances under which Exhibit One is alleged to have been executed tend to show that it is spurious. It is said that some of the statements of appellant given on his examination in the probate proceeding for the discovery of assets are inconsistent with his present claim, but we think such statements are, in the main, entirely consistent. That entire examination is before us. It was an examination under Sec. 3315 of the Code, we take it, for the discovery of assets, and for an order of court to turn them over to the administrator if it appeared that they were wrongfully held. The real estate was not involved in that proceeding, but it was inquired about. The examination was very searching. One circumstance of the alleged inconsistencies therein will suffice to illustrate appellees' claim as to this matter. Appellant testified that he wrote the body of Exhibit One at the dictation of Litteer and that he saw Litteer sign it. The witness was not competent to testify to such signing, and his evidence is not considered. It is referred to in connection with statements made by him in the probate examination which appellees claim are inconsistent with his present claim. During that examination, Lewis stated that the Litteers had promised to give him the 420 acre farm where he lived, and was questioned further as follows:

Q. "Did he give a deed for it?"

A. "No, sir."

Q. "Who joined with him in the gift?"

A. "His wife."

Q. "Did they sign any papers?"

A. "They said they did."

Q. "Well, did they that you know of yourself?"

A. "I didn't see them sign them."

He testifies now that, "He (Litteer) was talking about deeds, and I was talking about deeds. He said that he had

made deeds and that I would find them in the house; for the 420 acres of land." Appellees claim that by this appellant referred to Exhibits One and Two and meant to say that he did not see such exhibits signed. It seems to us he was referring to deeds and not to the Exhibits One and Two.

Appellant's claim is that Exhibit One was prepared and signed in the barn on the farm in the forenoon; that deceased had come out to attend the sale. There was a sale held on the farm that afternoon. Preparations for the sale were going on before the sale. A few people had come to the sale before noon.

It is contended by appellees that the execution of such a contract under the circumstances shown is unusual and improbable. Some other circumstances of this character will be noticed in connection with the discussion of the evidence. Appellees rely on the foregoing and similar circumstances and the evidence of two experts on handwriting to establish their claim that the contracts are not genuine. Such is the substance of their claim. Conceding the honesty and competency of appellees' experts, they had never seen deceased; they had never seen him write; and before the trial they had but three genuine signatures of deceased for examination and comparison, and some of these were with pen and ink. The disputed signature to Exhibit One is in pencil. It is conceded that comparisons of ink and pencil signatures are unsatisfactory. The experts were paid good fees. The evidence of such experts is much like the evidence of an attorney in the case, more or less biased. This applies also to appellant's expert, who was at least of equal ability and credibility. He had a larger number of admitted signatures for comparison. It is settled that such evidence is of a low order. It is a significant fact, and a weak point in appellees' case, that they did not inquire of any of the heirs, several of whom testified on other points, as to the signature of Litteer, nor did they attack the genuineness by any bankers, business men or others who were

familiar with his signature. Deceased had executed bank checks, notes, deeds and other writings.

On the other hand, the record shows a reason for making such a contract. Deceased made his financial start with money furnished by his wife; the appellant is the nephew of Mrs. Litteer; the relations between Litteer and appellant were intimate and friendly. The evidence does not disclose that there were any bonds of intimacy or friendship existing between any of the plaintiffs and defendants and A. J. Litteer. Deceased often expressed the desire and purpose of doing something for appellant.

The genuineness of the signatures of Mary L. Litteer, the wife of deceased, to Exhibits One and Two is established by competent evidence. That these are her genuine signatures is nowhere and in no manner disputed in the record. It is, perhaps, not so very material now as to her signature, because she died before her husband, but she was interested at the time she signed these exhibits. The evidence tends to show that they were signed by her after they bore the signatures of her husband. The fact that she signed these contracts is to our minds a strong circumstance that Exhibits One and Two are the genuine contracts and bear the genuine signatures of A. J. Litteer.

8. EVIDENCE :
transactions
with deceased :
what is not :
opinion on
handwriting.

The appellant testifies that he had seen Litteer sign his name a great many times and was familiar with his signature, and he testifies that in his opinion the signatures in question are the genuine signatures.

It has been repeatedly held that he is not incompetent under Sec. 4604 to give an opinion as to handwriting.

A. S. Meek testified that he had seen both Mr. and Mrs. Litteer sign their names a great many times and was familiar with their signatures, and gives his opinion that these signatures are genuine.

J. R. Cooper, a banker, testified that he had seen the signature of Litteer, and that checks had passed through his

bank on which his indorsement was necessary. He gave his opinion that his signatures to Exhibits One and Two are genuine.

Mr. Meehin, the expert for appellant, gives his opinion to the same effect.

J. B. Dant and Claude Johnston, who signed Exhibit One as witnesses, testified on the trial that they were present at the time Exhibit One was prepared and signed by Litteer; that they heard Litteer dictate the contract and witnessed its execution. They do not agree with each other in every detail as to just where the parties stood and as to just what was said and done, but they were asked to witness it. It is true they did not see Mrs. Litteer sign it, and they did not sign it as witnesses until some time after the transaction, and did so then at the request of the appellant. Lewis was advised by his attorneys, or some other person, to have these two persons sign as witnesses. These are circumstances proper to be considered on this question, but these witnesses are not otherwise impeached.

Exhibit One is written in a pocket account book.

Witness Wickersham corroborates the other witnesses, to some extent, as to the execution of Exhibit One. He testifies he was present at the sale on the date of this contract; that he saw Litteer and Mr. Lewis there, also Claude Johnston and Dant, but he is not quite clear that he saw them together in the barn with Litteer and Lewis; he saw Litteer and Lewis in the barn together. He did not pay much attention to what they were doing, but says Mr. Lewis had a book in one hand and a pencil in the other; that he was called away to attend to some of the stock, and that Litteer and Lewis were still in the barn when he went out of the barn door.

Hanshaw testifies that he was at the farm at the time of the sale on September 16, 1910; saw Mr. Litteer there about ten o'clock in the forenoon and talked with him before the sale; says he and Litteer sat down in the opening in the granary, and in the conversation Litteer said:

"Ernest has been with me a long while, and when I am done with this property I have here I intend to see that he loses nothing by it."

That while witness and Litteer were talking appellant came up there and witness noticed he had a day book in his hand, which witness describes as similar to the book in which Exhibit No. One is written; that when Lewis was standing there with the book in his hand Litteer says: "Let's go into the barn." That they got up and went in the barn; that this was about half an hour before dinner; that witness then went to see some other parties who had arrived; that he left Litteer and Lewis in the barn.

One of the appellees testifies to having been at the farm on the day of the sale, and says that Litteer was not there, at least witness did not see him. But the evidence is overwhelming that Litteer was there.

Appellees' witness Keith, who was at the sale on this date, testifies that while he was feeding the horses he saw Mr. Lewis and Mr. Litteer; they were then standing on the east side of the barn near the door. He did not notice them leaving there when dinner was announced; says he was busy and wasn't paying any attention to them. That he didn't notice any writing going on while they were standing there in the barn.

The evidence shows declarations and statements by Litteer that he had executed such contracts. These witnesses are Meek, Hanshaw, Osborn, Harvey and Lacey. These witnesses, and some of the others before mentioned, appear to be disinterested. Some of the testimony of these last named witnesses has been referred to in discussing the other branch of the case and will not be now again referred to.

Boyd testified that about a week after he was appointed administrator of Mrs. Litteer's estate, appellant came to his house and handed him the book containing Exhibit No. One and appellant referred to the contract therein; that the witness says that at that time it contained the signatures of Lit-

teer and his wife and appellant, that is, what purported to be their signatures. Witness says that he has seen the signatures of both Mr. and Mrs. Litteer, but he would not feel justified in saying that he knew them well enough to identify them.

Witness Cooper testifies that after the death of Litteer there was a controversy over a road which was proposed through the Litteer farm, and that he had a conversation with appellant in relation to the road. Lewis said that he wouldn't have the road go through there for a thousand dollars; that he didn't wish the road to go through, and when witness asked appellant why, Lewis said: "I will show you why," and he went into the vault and got a book and showed him the contract in reference to the land. It was Exhibit One. That at that time the names of Johnston and Dant were not attached, and witness asked Lewis if anybody saw that contract drawn up or saw Mr. Litteer sign it. Lewis said they did; that there were two parties, and witness advised him to have the men sign the contract as witnesses.

Witnesses, Mr. and Mrs. Wright, the father-in-law and mother-in-law of appellant, and Mrs. Lewis, his wife, also testified to seeing the contract, Exhibit One, soon after it was executed.

Some of the evidence before referred to in regard to Exhibit One applies also to Exhibit Two, and there is other evidence as to Exhibit Two, both for and against the genuineness of the signatures thereto. But, as before stated, the most determined attack seems to have been made on Exhibit One and the evidence of appellant is directed more to meeting the evidence as to that contract. There are other circumstances, both for and against the validity of these contracts, and as bearing upon the credibility of the different witnesses, and proper to be considered in weighing the evidence, but the opinion is already too long, and we shall not further discuss the testimony.

There is another exhibit, Number Four, in regard to notes

of the deceased, which appellant claims were signed by Litteer, directing appellant to get the notes and that they should be his. The genuineness of the signature to this is also challenged. The claim is that it was executed a few days before the death of Litteer. There is evidence to sustain this contract, and also evidence attacking its genuineness; but, as we understand the record, that matter is not an issue in this case, except as it may be involved in the question of adoption, and we shall not take the space to review the testimony or determine the genuineness of the signature to Exhibit Four. It appears that appellant gave his notes for the \$1,200.00 annual allowance referred to in Exhibit One. We do not understand appellees to claim that this would not be a performance or payment. The administrator is now insisting upon the validity of these notes, and that they should be paid. If deceased was satisfied to take notes instead of the money in performance of the contract, the heirs may not complain.

Our conclusion is that Exhibits One and Two are valid, and that appellant is entitled to a decree as prayed for the 420 acres. To that extent, the decree below is reversed; in other respects, affirmed. Appellant may have a decree in this court or in the district court, as he may elect. The costs in this court will be apportioned and taxed one-half to appellees, and one-half to appellant.—*Reversed* in part and *Affirmed* in part.

LADD, C. J., EVANS and WEAVER, JJ., concur.

J. H. GRAHAM, Appellant, v. ROY CRISMAN et al., Appellees.

APPEAL AND ERROR: Questions Reviewable—Failure to Object.

- 1 Certain colloquium between counsel and court held not to raise or preserve any question.

ACCORD AND SATISFACTION: Burden of Proof—Performance.

- 2 He who pleads "accord and satisfaction" has the burden of

proof to establish both the accord and the satisfaction of the accord—in other words, performance. Ordinarily accord without satisfaction—performance—avaleth nothing.

PRINCIPLE APPLIED: Plaintiff brought action on a lease calling for a specified cash rental. Defendants pleaded an accord and satisfaction in this, that later in the season, on account of a partial failure of crops, the plaintiff agreed to accept the proceeds of a certain portion of the crop in lieu of the cash rental. This plaintiff denied. *Held*, the defendants must prove both the accord and performance on their part—that is, that they delivered the said proceeds to plaintiff.

APPEAL AND EBBOB: Failure to Comply with Rules—Costs.

- 3 Failure, in instant case, to comply with the rules governing appeals, sufficiently met by taxation of costs.

Appeal from Harrison District Court.—HON. A. B. THORNELL,
Judge.

SATURDAY, APRIL 11, 1914.

REHEARING DENIED MONDAY, FEBRUARY 15, 1915.

ACTION upon a written lease to recover rent. By way of affirmative defense the defendants pleaded an accord and satisfaction. There was a verdict for the defendants. The plaintiff appeals.—*Reversed and Remanded.*

Cochran & Barrett, for appellant.

H. H. Roadifer and *H. L. Robertson*, for appellees.

EVANS, J.—The defendants are G. W. Crisman and Roy Crisman, father and son. The plaintiff leased to them his farm of 320 acres by written lease for the year 1911 for an agreed rental expressed therein of \$1,600. The defendants paid about \$460 of such rent. Their plea of accord and satisfaction is based upon the claim that in August or September, 1911, because of the partial failure of crops, the plaintiff

proposed to reduce his claim for rent and to accept, in lieu of the stipulated rental, the proceeds of one-half of the crop and that they accepted such proposal and paid to the plaintiff such proceeds as agreed. This contention is denied in material respects by the plaintiff. He admits, however, that he did offer to accept \$1,300 in full of the rent and that such amount was then estimated by him and the defendants as one-half of the proceeds of the crop. It is undisputed that such alleged offer was not accepted by the defendants. At the time of this alleged agreement the threshing of the small grain had occurred, resulting in about 455 bushels of wheat, barley and oats. There was a large amount of valuable hay, which was later sold at some \$12 to \$15 per ton, and 120 acres of corn. The witnesses differ as to the yielding quality of the corn crop. Defendants admit, however, that they cut 40 acres of corn fodder, for which they were offered \$10 per acre, and that there were 900 bushels of husked corn worth sixty cents a bushel. The new oral contract relied on by the defendants is stated by each of them. Defendant Roy Crisman testified as follows:

"Graham said it was a bad year and he would have to do the best he could; to give him—to sell the small grain and give him half ($\frac{1}{2}$) the money and then he went on further to talk about the crops. He said he thought the best way to divide it was to sell it. He said he didn't care to fool with it. Just to sell it and give him one-half ($\frac{1}{2}$) the money. He said he would cut the pasture half in two. The pasture land was \$5 an acre. He said to go ahead and put the hay up and do with that like we did with the small grain. He did not say anything about the corn, but he said later on, to feed it to the cattle.

CROSS-EXAMINATION.

"Mr. Graham and my father and I were all that were present at the granary when we had our talk about the rent.

I asked him if he would take half ($\frac{1}{2}$) the crop instead of cash. He said he thought that would be a fair way to settle it. I then said all right."

G. W. Crisman testified as follows:

"Down by the granary he told us he would take one-half ($\frac{1}{2}$), that we should market it and divide the money. I said it is the only way to divide it—is to haul it to town and sell it and divide the money and each one take one-half of the share. He said all right. We talked the matter all over. He told us he would take one-half the hay, also one-half the crops generally. This was the second time he was there."

It appeared from the evidence of defendants that most of this corn and much of the hay was fed by the defendants to mortgaged stock. They also testified that this course was consented to by the plaintiff, especially as to a certain bunch of 38 steers and that he was to receive one-half the margin to be realized from such stock over and above the mortgage. Such full margin later proved to be \$171.00. This arrangement was said to have been made subsequently to the first oral contract of accord. It appeared also that there were about 300 bushels of corn left over and above the amount thus fed, from which the plaintiff realized nothing. The defendants divided this among themselves. This is explained by Roy Crisman in his evidence as follows:

"There was about 300 bushels of corn left and Graham told me to give Pa some of it to make a crop on—divide it with him and I did so."

This arrangement was a still later modification of the alleged oral agreement.

The foregoing is perhaps a sufficient statement of the salient facts to enable our consideration of the errors assigned by appellant.

1. The first error assigned by appellant relates to the admission of certain testimony of one of the defendants in rebuttal in explanation of a certain conversation with him which had been testified to by a witness on behalf of plaintiff. We fail to find any record of any objection made by the plaintiff at any stage of the evidence. As to the evidence complained of in argument, the following is the record:
1. **APPEAL AND ERROR:** questions reviewable; failure to object.

Mr. Cochran: "Hold on a minute! If you are going to try and make this rebuttal I am going to insist on having you confirm it to—"

The Court: "Oh, I suppose he has the right to give his version of the conversation."

Mr. Cochran: "He hasn't the right on examination in chief."

The Court: "Oh, I think so."

Mr. Cochran: "Give us an exception."

It is needless to say that no question is raised or preserved by such a record.

2. Upon the submission of the case, the plaintiff submitted to the court certain requested instructions which were refused. One of these purported to instruct the jury that the burden was on the defendant not only to prove the alleged oral contract to settle but that the defendants must prove also that they performed such contract of settlement by the delivery of the proceeds agreed on. The trial court gave no instruction to this effect. On the contrary, the necessity of proving "satisfaction" by the defendants was entirely ignored in the instructions and the case was submitted on the theory that if the contract was proved, it was a good defense regardless of performance. It is quite clear to us that the trial court erred at this point and that the case presented by defendants both by pleadings and evidence is one wherein the
2. **ACCORD AND SATISFACTION:** burden of proof; performance.

general rule obtains and wherein both accord and satisfaction must be shown. The following excerpts from a few of our cases will indicate the general rule and the qualifications and exceptions thereto.

In *Hall v. Smith*, 10 Iowa 45, 48, it was said: "An accord and satisfaction arises, where there is another agreement between the parties, which is itself the satisfaction for the debt or former contract, or when such second agreement has been executed and performed. This is the statement of the general rule. The exceptions and modifications to it we need not at present notice. Where the new or second undertaking has been performed and this performance accepted, there will usually be but little if any difficulty in determining that the satisfaction is complete. In this case it is not claimed that there was any such performance, and the question is whether the new promise itself is to have the effect of satisfying the original claim or of taking away the remedy on the bond.

"Mr. Parsons says, that a promise without execution is no satisfaction unless by express agreement it had this effect. And again, it is said that the promisee may sue on the original cause of action, unless by the tenor or the legal effect of the new contract, the new promise is itself a satisfaction and an extinction of the old one. 2 Parsons on Cont. 194, 196, 199, note s; 5 Term R. 513; 13 M. & W. 63. 'It' says Redfield, J., in *Babcock v. Hawkins*, 23 Verm. 561, 'is ordinarily a question of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose.' In that case this intent was shown by executing a receipt in full to settle all book accounts to that date, including that sued on. So in arriving at the intention courts will ascertain whether the second agreement is founded upon a new consideration, whether the promisee has surrendered or retained the evidence upon which to maintain his former remedy, whether any securities have been given up, whether a release or receipt has been executed, whether the new contract is of a higher grade than the old. These and

similar considerations are to have weight in determining the intention of the parties.

"In this case we do not understand either the answer or proof to go to the extent above laid down. The mere agreement of Bates to pay a thousand dollars, remaining unperformed, without further proof that this agreement was to be received in satisfaction of the plaintiff's remedy against the obligors in the bond for the failure of the principal to prosecute his action, will not extinguish the old or original demand."

On a second appeal of the same case, *Hall v. Smith*, 15 Iowa 588, it was said:

"The common law declares that, without a satisfaction, an accord is no bar to a suit upon the original obligation. If, however, the accord is founded upon a new consideration, and accepted as satisfaction, it operates as such satisfaction, and will be held to take away the remedy upon the old contract. This we believe to be in accordance with the current of authorities, and is certainly in harmony with the analogies and equities of the law. Story Cont., Sec. 982; Para. Cont. 194, *et seq.* Whether this has been a new consideration in legal contemplation, and particularly whether the accord or (new) agreement was accepted as satisfaction, depends upon the circumstances of each case; and in determining its tenor and effect, we must, from the circumstances, endeavor to ascertain the intention of the parties. For, while some authors and some of the cases speak of the unexecuted promise being satisfaction in those cases only where it is made so by express agreement, we suppose that ordinarily no rule is violated in holding that it is sufficient, if this intention or purpose is evidenced by any unequivocal act, or in any clear manner. It was said in examining a somewhat similar proposition in *Levi v. Karrick*, 13 Iowa 344: 'The question is one of evidence or contract, and whether . . . established by necessary implication, or from express stipulation, the rule is the same.' "

In *Bradley v. Palen*, 78 Iowa 126, 130: "The court instructed the jury in substance that if it found that there had been an agreement to settle the dispute as to the wagon, and that as a part of the settlement the defendant was to ship the wagon to Algona when requested to do so, and that if, after said notice or request, he failed to so ship it in a reasonable time, he could not urge such settlement against plaintiffs' right to recover. Appellant's objection to this instruction is that, if there was a contract of settlement, it put an end to the contract of sale, or the order, even though the settlement was not complied with. It is a little difficult to see on what plaintiffs could base their cause of action, unless it was on the fact of their sale of the wagon, and the failure to pay therefor. We think, before the defendant can avoid his contract of sale by an accord and satisfaction, he must establish both. An agreement to satisfy a claim, by way of settlement, is not enough. It must be satisfied. It was not enough to agree to return the wagon in settlement, but it must be returned as agreed; and, if not, it was not a settlement of the debt. *Hall v. Smith*, 10 Iowa 45, and other cases there cited. The instruction of the court is in harmony with this view."

Appellee relies at this point upon *Merry v. Allen*, 39 Iowa 235; *Raymond v. Krauskopf*, 87 Iowa 602; *Evans v. McKanna*, 89 Iowa 362.

We find nothing in these cases inconsistent with the above quotations. In the *Merry* case, a new written contract was concededly executed which purported to be a substitute for the former contract and to include other subject matter. The resistance to such new contract was that there was a mistake in its terms and that it had in fact never been delivered. In the *Raymond* case, a judgment upon a directed verdict was reversed on the ground that there was sufficient evidence to go to the jury on the question whether there was a consideration for the agreement. The question of satisfaction was not involved. The alleged agreement relied on in that case if proved was proved by undisputed evidence and was not in-

volved in any question presented on the appeal. The *Evans* case was one where a surrender of a lease at the expiration of a year was shown and subsequently a new oral lease for the same property was entered into. It will be seen, therefore, that none of the foregoing cases involve the question of accord and satisfaction in the sense in which that phrase is used. As an abstract proposition it is elementary that any contract between parties may be supplanted by another founded upon an appropriate consideration and that the new becomes the substitute for the old. But where one party to a contract performs his part according to its terms and then agrees to accept from the other party a modification of the consideration moving to him, he is not ordinarily bound thereby unless the other party perform. The very agreement of the other party in such a case is that he shall perform, and it is not available to him as a defense against the first party unless he does perform. It is contended for the appellee that the facts of the case at bar do not bring it within this rule; that the new agreement was intended as of itself, regardless of performance, to substitute and satisfy the prior agreement to pay. The evidence in the record furnishes no justification for this contention. Without dispute, it is a case where the plaintiff aimed to make a substantial concession to the defendants. Such is the pleading of the defendants. The undisputed circumstances of the case completely hedge the defendants and confine them to the rule of accord and satisfaction. The reasonableness of this rule is well illustrated in the case. If the plaintiff can be defeated in his action upon the lease by the mere subsequent agreement of the defendants without performance, then he is driven to another action upon the alleged oral agreement. The two defendants testify differently as to what such oral agreement was. The plaintiff himself in manifest good faith denies its existence. He must sue, therefore, not only upon a contract which he himself denies but upon one concerning the terms of which the defendants themselves disagree. It is very appropriate, therefore, that

the same jury which should find the existence of such contract, should also determine its terms and whether it was performed by the defendants. Such situation is further emphasized in this case by the successive modifications of the original modifications which were testified to by the defendants to meet the exigencies created by indisputable facts.

3. The plaintiff also asked an instruction for a directed verdict on the ground that the evidence wholly failed to show satisfaction or performance of the alleged oral agreement by defendants. The point made in such requested instruction is now urged upon us. It presents a serious question upon this record. In view of the fact, however, that the case was tried by the court below on the theory that it was not necessary for the defendants to prove satisfaction and in view of the fact that a new trial must be ordered, we think we ought not to undertake to pass upon the sufficiency of the evidence in that regard. We therefore make no pronouncement thereon.

4. It is urged by appellee that appellant has failed to comply with the rules of the court in the presentation of his appeal and more particularly in the form of his argument

8. APPEAL AND
ERROR: failure
to comply with
rules: costs. and it is urged that the judgment ought for that reason to be affirmed. We think it must be said that the appellant's argument is quite unconventional and quite unconscious of our rules. We think, however, that an appropriate penalty can be imposed in a taxation of costs. No costs of printing appellant's brief will be taxed in this court in his favor.

For the error indicated in division 2 hereof, the judgment below will be reversed and the cause remanded.—*Reversed and Remanded.*

LADD, C. J., WEAVER and PRESTON, JJ., concur.

GEORGE G. HINK, Appellant, v. H. H. SMITH, Appellee.

TRIAL: Directed Verdict—When Permissible—Conflicting Evidence.

- 1 Verdict should not be directed when the evidence is such as to (a) support a verdict for plaintiff in some amount, or (b) support a verdict for plaintiff on a contested issue.

PRINCIPLE APPLIED: (a) Plaintiff and defendant dissolved partnership. Plaintiff's evidence showed that defendant had drawn \$135 more than his share of the cash; that there were outstanding accounts to about that amount; that defendant agreed to pay plaintiff this \$135 as soon as he could collect it. Record showed some collections had been made but plaintiff's evidence showed the agreement to pay the \$135 was not conditional on collections being made but was simply an agreement for a reasonable time in which to pay. *Held*, a directed verdict for defendant was erroneous.

PRINCIPLE APPLIED: (b) Plaintiff, the holder of a note, sent the note to a bank for collection. The first bank sent it to a second bank. The second bank turned the note over to its attorneys. The attorneys negotiated with the maker, who claimed insolvency but offered a compromise. The attorneys consulted with the first bank, which bank communicated with plaintiff by phone. Plaintiff testified he refused to authorize a compromise. The bank understood otherwise and authorized the attorney to compromise, which was done. The first bank applied the proceeds on another note due the bank from plaintiff. Plaintiff testified he repudiated this. *Held*, plaintiff had the right to have the jury pass on the authority of the agents to compromise and a directed verdict for defendant was error.

PLEADING: Unauthorized Acts of Agent—Ratification—Burden of

- 2 Proof. He who pleads ratification of the unauthorized acts of an agent must establish the ratification.

Appeal from Woodbury District Court.—HON DAVID MOULD, Judge.

MONDAY, FEBRUARY 15, 1915.

ACTION at law in two counts. In the first count the plaintiff claimed \$135 upon an oral agreement supported by an appropriate consideration. In the second count he claimed a balance due upon a promissory note. The note was for \$2,000 with a credit of payment of \$1,000 endorsed thereon. At the close of plaintiff's evidence upon motion of defendant, the trial court dismissed the first count of the petition. At the close of all the evidence the court directed a verdict for the defendant. The plaintiff appeals.—*Reversed*.

C. R. Metcalfe, for appellant.

No appearance for appellee.

EVANS, J.—I. The causes of action set up in both counts were related to the same general facts. Prior to December, 1909, the defendant Smith was engaged in the livery business at Sioux City. At that time the plaintiff purchased a half interest in the business paying therefor \$2,060. The partnership continued nine months when in September, 1910, the plaintiff sold out to Smith. In pursuance of such sale Smith executed his note to the plaintiff for \$2,000 due in one year. It is the plaintiff's contention that a \$2,000 note was given in payment for the plaintiff's half interest in the livery stock; that the amount of cash and accounts already earned was by oral agreement to be divided between them; that Smith had overdrawn his share of the cash collected by \$135; that there were uncollected accounts outstanding to the amount of about \$135; that to equalize his overdraft and to cover one-half of the uncollected accounts, Smith agreed to pay plaintiff \$135; that he agreed to do so as soon as he could collect it.

This is the agreement involved in the first count. The testimony of the plaintiff thereon was undisputed. It was

1. TRIAL: directed verdict: when permissible: conflicting evidence.

somewhat confused in some of its details but such details were not material. Some stress was laid in the motion to dismiss that the testimony did not show with any certainty what amount was due plaintiff from Smith. This was predicated upon the thought that the agreement was conditional upon the collection of the accounts by Smith and that there was no showing as to how much had been collected by Smith upon the accounts. If the amount of plaintiff's recovery should be deemed as limited to the amount of Smith's collections, it still remained that there was something due the plaintiff. Even then he would be entitled to recover one-half of the amount of Smith's overdraft. But the agreement as testified to was not conditional. The provision for collection was only a stipulation for reasonable time according to the contention of the plaintiff. The plaintiff was clearly entitled to go to the jury upon this count.

II. Turning to the second count there was no issue made upon the execution of the note and its validity. The defense was a plea of settlement for \$1,000. Two facts were alleged as furnishing a sufficient consideration for such settlement, viz.: (1) That Smith was insolvent and (2) that the settlement was made with one Butler, a third party. As to the first fact the evidence of insolvency was very slight indeed. On the other hand there was abundant evidence to justify a finding of solvency. The same remark may be repeated as to a settlement having been made by a third party. For the purpose of obtaining the \$1,000 which was paid, Smith borrowed \$500 from Butler and gave him security therefor. This is practically Butler's own testimony and the jury could have thus found the fact. The purported settlement was had in fact without the actual knowledge of the plaintiff and with persons who purported to act as his agents. The plaintiff denied the authority of the agents to make such settlement and claimed to have repudiated the same when he learned of it. It appeared that he had sent the note to Baxter Reed & Co. of Ida Grove for collection. They sent it to the Se-

curity Bank of Sioux City. The Security Bank placed it in the hands of their attorneys. Smith represented to the attorneys that he was insolvent and could not pay and these representations were undoubtedly the moving cause which led to a purported settlement. The attorneys consulted with Baxter Reed & Co. Baxter Reed & Co. consulted by phone with the plaintiff. The plaintiff testified that he expressly refused to consent to such settlement. Baxter Reed & Co. understood it otherwise and they directed the attorneys to accept the amount. The amount collected was remitted to Baxter Reed & Co. who applied the amount upon a note held by them against the plaintiff. The attorneys were strangers to the plaintiff and never had any consultation with him. Both

2. PLEADING :
 unauthorized
 acts of agent :
 ratification :
 burden of
 proof.
 Baxter Reed & Co. and the attorneys at Sioux City undoubtedly acted in good faith on their part. But the question of authority to settle for less than the amount due on the note was nevertheless vital. The testimony of the plaintiff was sufficient to have justified a verdict in his favor on that question. The defendant pleaded ratification but that also was a question of fact for the jury and the affirmative of it was upon the defendant. The plaintiff was clearly entitled to go to the jury on this count also.

For the reasons indicated the judgment below must be—
Reversed.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

T. L. MYERS, Appellee, v. J. B. TALLMAN, Appellant.

FENCES: Partition Fences—Undulating or Horizontal Measure-
 1 ment. Where the fence viewers ordered a landowner to construct a certain number of rods of partition fence, *held*, the specified number of rods should be determined by measuring over the

undulating surface of the ground and not by a level horizontal measurement.

ESTOPPEL: Inconsistent Attitudes—Alleging Contradictions—Partition Fences. He is not to be heard who alleges things contradictory to each other.

PRINCIPLE APPLIED: Plaintiff made application to the fence viewers and secured an order commanding defendant to maintain "a hog-tight" partition fence across a stream. Defendant adopted and constructed a device which was the only practical method of maintaining "a hog-tight" fence across the stream. *Held*, plaintiff would not be permitted to say that defendant's structure interfered with the free course of the water.

FENCES: Partition Fences—"Hog Tight"—Streams—Applicability of Statute. Whether the law with reference to partition fences and the requirements to keep same "hog-tight" is applicable to fences across substantial streams, query.

FENCES: Partition Fences Across Streams—"Hog-Tight" Requirement. Where defendant was under legal orders to maintain the major portion of a required hog-tight partition fence across a stream and plaintiff was under like orders to maintain the remaining portion of such fence, plaintiff having originally secured the order that such fence be so maintained, *held*, that each was under obligation to so maintain his respective portion as to maintain equal pressure on the banks in high water.

ESTOPPEL: Partition Fences—Failure to Maintain—Equal Fault.
5 No man can take advantage of his own wrong.

PRINCIPLE APPLIED: Plaintiff and defendant were both under legal orders to maintain a required hog-tight partition fence across the bed of a stream, defendant having the major portion of the fence. Plaintiff so constructed his portion that the pressure of water was greater against the bank where his portion of the fence was located, thereby threatening a washing out of the bank. To obviate this he built a so-called jetty to deflect the current. *Held*, his own fault having contributed to the necessity for the jetty, he could not recover the cost of the same of defendant, even though defendant was in fault in having perversely refused to maintain 18 inches of his fence.

Appeal from Guthrie District Court.—HON. W. H. FAHEY,
Judge.

THURSDAY, NOVEMBER 5, 1914.

REHEARING DENIED MONDAY, FEBRUARY 15, 1915.

SUIT in equity to enjoin the defendant from maintaining a certain fence across a creek, on the ground that it diverted the flow of water to the damage of the plaintiff. There was a decree for plaintiff substantially as prayed. The defendant appeals.—*Affirmed* in part, *Reversed* in part.

Weeks, Vincent & Weeks, for appellee.

Sayles & Taylor, for appellant.

EVANS, J.—The parties are adjoining landowners and are under mutual obligation to maintain the partition fence.

The partition line between them is approximately 57 rods long and runs north and south; the land of plaintiff Myers lies on the east side of the line and that of the defendant, Tallman, on the west. The partition line crosses a large creek, known as Brushy Fork, and this is the battle-ground.

The general course of the creek and its flow is from west to east. At the partition line it runs due east, cutting the line at right angles.

The fence involved in this suit is that part of the partition fence constructed by the defendant between the banks of this creek. As will be hereinafter set forth, the defendant was under obligation to construct a "hog-tight" fence across this creek. There is no objection to its "hog-tight" character.

The claim of the plaintiff is that it is so constructed that it impedes the flow of water, and gathers sediment and drift, and diverts the current of the water towards the north bank, and that such diversion has caused the cutting of such north bank at the line and upon plaintiff's land, so as to threaten a change in the course or bed of the stream.

In order properly to get the situation of the parties, ref-

erence must be first had to a previous litigation between them, and to the judgment or order entered in such case.

In October, 1911, the plaintiff called the fence viewers to apportion the partition line in question. They ordered the plaintiff to construct the north 37 rods of such partition fence, and the defendant to construct the remainder.

Under this apportionment, it fell to the defendant to construct the fence across the creek. It was for this reason that the greater number of rods was apportioned to the plaintiff.

Under this order, the plaintiff's apportionment would extend to a point approximately one rod north of the water's edge in the creek at low water. This terminal point was upon the high bank, 8 feet or more above the low water level.

The order of the fence viewers was that the fence to be constructed should be "hog-tight." No further specification was included.

The defendant appealed to the district court. The result of the appeal was that another rod was added to the apportionment of the plaintiff. Each party complied with the final order of the court according to his conception of it.

The defendant was confronted with the difficulty of constructing a practical, hog-tight fence across this creek. This was a living stream with considerable variation in its flow of water. At low stage, the water was only a few inches deep, and extending over a width of 20 feet or more. High water increased the depth to several feet, the banks on each side being about 8 feet high and about 50 feet apart.

It is without serious dispute that an ordinary fence of posts and hog-tight woven wire could not be maintained across the bed of such a creek. It would necessarily be carried away by every freshet, through the weight of the water and its drift.

The defendant adopted a plan calculated to give permanency to his fence. Across the bed of the stream he sunk into the soil a large log 29 feet long and a foot or more in diameter. This he anchored down by various devices.

Alongside of this log and along the line of partition he drove posts into the bed of the stream, from the south bank to the north end of the log, which was close to the north bank. They were cedar posts about 6 inches wide, and were set 4 or 5 inches apart, and were spiked to the log as far as it extended. These posts were set at an angle of 45 degrees, leaning down stream, so as to facilitate the passing over them of the contents of the stream. They were from 2 to 2½ feet high above the bed, and were lower at the center than at the sides. This difference was intended to hold the current of high water as near the center of the stream as possible.

The plaintiff contends that the practical effect of this fence, as constructed, was to divert the current of the stream around its north end, and against its north bank, and that such diversion threatened the cutting of a new channel for the stream.

On the other hand, the defendant contends that the impeding effect of the fence upon the current was only such as was incidental to its character as a hog-tight fence, and that the diversion of the water complained of was directly caused through plaintiff's own default. In complying with the order of the court that he construct an additional rod of the partition fence, the plaintiff constructed the same in the form of a swinging gate. This gate was hung at its north end upon a post and extended south therefrom to the water's edge. The south end thereof was so adjusted that when high water reached it, it would swing down stream, thus leaving an opening for the running water. It had the merit that it imposed no obstacle to the current; but it is doubtful whether it imposed any more obstacle to the passing of hogs, if they had been present. It did not close automatically, and was usually left open.

It was the opinion of several witnesses on both sides that this opening at the north end of the defendant's fence tended to draw the current in that direction. We think such conclusion is fairly justified, upon a consideration of all the evi-

dence. The water naturally turned toward the point of least resistance. This effect was increased also by the fact that there was a space of from 14 to 18 inches between the north end of defendant's fence and the south end of the plaintiff's gate. This space was covered by neither party, because each claimed that it belonged to the other. This unoccupied space, of course, enlarged the opening and intensified the tendency of the water to that direction. The current thus formed tended to cut away the north bank, and tended to shift the bed of the stream accordingly.

The plaintiff demanded of the defendant that he remove the obstruction in the stream. Following this, the plaintiff built, for protection of the north bank, what is called a jetty. This was constructed of posts and planks so placed as to receive the force of the current, and to deflect it back toward midstream.

The defendant demanded the removal of this jetty, and has interposed a counterclaim in this action asking that its maintenance be enjoined, and that he recover damages caused thereby to his structure in the bed of the stream. His claim is that this deflection of the current has undermined the north end of his log and threatens to carry it down stream.

The controversy between the parties as to the space of 14 or 18 inches that separate their two structures is quite petty. It could have cost but a few dollars to close the gap, and either one of them might wisely have covered it with his eyes closed to the question of his strict obligation to do so.

This part of the controversy arose over a difference in method of measuring the additional rod of fence which was imposed on plaintiff by the district court on appeal.

Plaintiff's south terminus, as made by the fence viewers, was at the top of the eight-foot bank. After the trial in the district court, the plaintiff set a large post south of such terminus, and from there extended a sixteen-foot gate, making a total extension of 17 feet. Defendant urges, however, that

1. FENCES: par-
tition fences:
undulating or
horizontal
measurement.

this distance was measured down a sloping bank and that there was a vertical difference of eight feet between the south end of the gate and its north end. He contends that the measurement of the extra rod should be made on a level, and should be the equivalent of the *base line* of the triangle, instead of its hypotenuse.

This contention is based upon the rule in surveying that "the area of a piece of land is the area of the level surface included within the vertical planes through the boundary lines." This is doubtless the correct rule for the accurate determination of areas. The horizontal measurements are determinative of area, and not the increased distances which might result from following the undulation or precipices of an uneven surface. Such rule, however, is not controlling here. We have to do with construing the order of the fence viewers and of the district court.

The fence viewers ordered the plaintiff to build the north 37 rods of the partition fence. This partition fence was to be laid upon the surface of the ground and upon its undulations. Its length would necessarily be measured by the undulating surface and not by the level horizontal distance.

As we understand the record, the plaintiff had complied with the order of the fence viewers before the trial was had in the district court. The effect of the court order was that he build an additional rod.

There is no dispute between the parties as to the location of plaintiff's southern terminus as the fence viewers fixed it. So far then as the length of plaintiff's fence was concerned, it must be held that he conformed to the order of the court, and that the method of measurement adopted by him was the method contemplated by such order.

So far, also, as the disputed space of from 14 to 18 inches is concerned, the defendant was, and is, under obligation to cover it in substantially the same manner as he has covered the rest of the line in the creek bed.

As to the plaintiff's jetty, we are not able to determine

clearly from the record whether it is located upon the partition line. We infer that it is. If so, it will answer the purpose of a "hog-tight" fence, and in that respect will comply with the order of the court in the previous case. It ought, however, to be provided with suitable openings for the passing of water, above low water stage. The defendant's structure as a whole necessarily impedes to some extent the flow of the water, and to that extent increases the pressure upon the banks, especially when the water is high; but if the current is equalized as to both banks, it furnishes the only practical protection possible, in view of the necessity of maintaining a "hog-tight" fence across the bed of the stream.

It is argued for the plaintiff that the defendant's structure naturally gathers the debris that comes with the stream, and that it amounts, in fact, practically to a dam upon the stream, and that the defendant has no right to thus interfere with the free course of the water. However correct this argument might be as an abstract proposition, the plaintiff closed his mouth against it when he obtained the adjudication which required the defendant to maintain a hog-tight fence across the stream.

If we had to pass upon the original propriety of that order, we should have grave doubts as to whether the law relating to partition fences and the apportioning of the same has any reference to such an undertaking as is here presented.

That partition fences may be ordered and laid over small streams, we have no doubt; but the larger the stream the greater the difficulty, and there must be some point of increase in the size of the stream wherein the building and maintenance of a partition fence over the same should be deemed impracticable, and therefore beyond the contemplation of the statute on that subject. See *Foster v. Bussey*, 132 Iowa 640.

In view of the mutual attitude of the parties both in this

2. ESTOPPEL: inconsistent attitudes: alleging contradictions: partition fences.

8. FENCES: partition fences: "hog tight": streams: applicability of statute.

suit and in their previous litigation, as respects the practicality of maintaining a hog-tight fence across this creek and the application of the statute thereto, we assume such applicability for the purpose of this appeal.

The case presented, therefore, is one wherein the defendant was bound to maintain a "hog-tight" fence across such stream. The decree entered herein which required him to remove this structure and to restore the currents of the river did not purport to absolve him in any degree from his obligation to perform the previous order of the court.

The oral findings of the court presented to him the following problem :

"It is urged for Mr. Tallman that the court required him to put in a hog-tight fence. Any fence that would turn stock in the stream would probably be sufficient but he has no right to deflect the water from its natural channel and turn it onto Mr. Myers' land. . . . I do not know what is practical for you to put in there. And all I do know is that what you have in there impedes the flow of the water and deflects it. I do not designate what kind of a structure you will build, you will have to put in something that does not impede the flow, and that is what the plaintiff will be required to do, he will have to construct it so as to leave the water unimpeded as much as he can and you will have to do the same in that part you put in."

The evidence in the record presents no other method which could be adopted for the maintenance of a successful hog-tight fence across this creek.

The statutory definition of a lawful fence is contained in Code Sec. 2367, in its amended form as amended by Chap. 138, Thirty-third General Assembly. Such chapter presents certain specifications which may be substituted by an equivalent. It presents no specifications for a hog-tight fence unless they are contained in the following proviso :

"Provided, however, that all partition fences may be made tight by the party desiring it, and, when his portion is so completed, and securely fastened to good substantial posts, set firmly in the ground, not more than twenty (20) feet apart, the adjoining property owner shall construct his portion of the adjoining fence, in a like tight manner, same to be securely fastened to good substantial posts, set firmly in the ground not more than twenty (20) feet apart. All tight partition fences shall consist of not less than twenty-four (24) inches of substantial woven wire on the bottom, with three (3) strands of barb wire with not less than thirty-six (36) barbs of two points to the rod on top, the top wire to be not less than forty-eight (48) inches, nor more than fifty-four (54) inches high, or not less than eighteen (18) inch substantial woven wire on the bottom with four (4) strands of barb wire of not less than thirty-six (36) barbs of two (2) points to the rod, the top wire to be not less than forty-eight (48) inches nor more than fifty-four inches high, or good substantial woven wire not less than forty-eight (48) inches nor more than fifty-four (54) inches high. In case adjoining owners or occupants of land shall use the same for pasturing sheep or swine, each shall keep his share of the partition fence in such condition as shall restrain such sheep or swine."

It will be noted from the last clause that a "hog-tight" fence is one which shall be kept "in such condition as shall restrain such sheep or swine."

If defendant had followed the actual specifications contained in the above proviso and had set his posts deep enough and had procured woven wire that was strong enough to withstand the weight of the flood and its contents, its effect as to the accumulation of debris and driftwood would necessarily be the same as that occasioned by the present structure.

There is no claim that the present structure actually dams the water; the water does pass through it somewhat impeded.

It is undisputed that the water has never appeared higher above the structure than below it, although

4. FENCES: partition fences across streams: "hog-tight" requirement.

that may be the case to some extent when the opening at the north end is closed. But so far as the mere damming of the water is concerned, the plaintiff has no room to complain. His land is not on the upstream side of the structure. He is not complaining of overflow on the one hand or lack of water on the other. He is interested only in the "hog-tight" character of the structure, and in the maintenance of the current of the stream along its present channel. Our conclusion upon this record is that there is no other practical method of maintaining a "hog-tight" fence across this stream than the method adopted, provided uniformity of impediment be maintained at each bank.

We know of no place to look for affirmative guaranty of the ultimate success of the enterprise. It may go down stream in the end.

For the present, at least, the structure is a good-faith response to the order of the fence viewers, as confirmed on appeal. If such order has really called for what is impossible, within the approximate limits of the reasonable expense of a partition fence, future developments will bring the disclosure.

Certain it is that a litigant party should not be under the contradicting compulsion of one decree to construct and of another to tear down, unless, in performing the latter, he be absolved from the former.

Upon the record before us, therefore, we reach the following conclusions:

(1) That the defendant should be required to extend his structure to cover the disputed space of 14 or 18 inches.

(2) That with such extension he may maintain his present structure.

(3) That the plaintiff may maintain his present structure called a jetty or its equivalent, provided that suitable openings be made therein for the passage of water above low water stage, and that such openings shall be so made as to be calcu-

lated to maintain the equality of the pressure of high water upon each bank.

(4) That the defendant is not entitled to enjoin the use of such jetty in such manner and is not entitled to damages from the plaintiff for the previous use thereof.

(5) That the default of both parties contributed to the deflection of the current around the north end of the defendant's structure.

(6) That the plaintiff is not entitled to recover damages from the defendant for the expense of building the jetty, and the judgment entered in his favor therefor, for \$90.20, is reversed.

5. **ESTOPPEL:**
partition
fences: failure
to maintain:
equal fault.

(7) That the plaintiff is not entitled to the order entered below requiring the defendant to remove the structure complained of, and the decree to that effect is reversed.

The costs in this court will be apportioned, one-half to each party.—*Affirmed* in part, *Reversed* in part.

LADD, C. J., WEAVER, GAYNOR and PRESTON, J.J., concur.

HARRY BERNSTEIN, Appellee, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

TELEGRAPHS AND TELEPHONES: Failure to Deliver Message—

- 1 **Damages—Nature of Action—Contract or Tort.** An action for damages for negligent failure to deliver a telegraph message may sound in contract or tort.

TELEGRAPHS AND TELEPHONES: Failure to Deliver Message—

- 2 **Nature of Action—Negligence—Tort—Pleading.** The action under the pleading in instant case charging gross and excessive carelessness and negligence in failing to deliver a message construed as sounding in tort.

DAMAGES: Ex Contractu—Ex Delicto—Distinction—Contemplated
3 Damages—Proximate Results—Telegraphs and Telephones.

1. Damages *ex contractu* must be (a) proximate and (b) such as were reasonably within the contemplation of the parties, etc.

2. Damages *ex delicto* need only be proximate.

Rule No. 2 is not changed by Sec. 2163, Code, in relation to liability of telegraph companies for negligence in delivering messages.

PRINCIPLE APPLIED: (a) Action for damages for a failure of defendant to deliver to a husband the following message sent by his wife, dated July 18, 1911: "Am sick. Come if you can. Wire if coming." Her child was born near 11:30 P. M. of July 18th, at which time she had attendants. Had the message been properly delivered the husband would have been with his wife by 7:00 A. M. of July 19th. The husband not coming, she arose from her bed near 10:00 A. M., called a boy and sent him for food for two of her other children, which act of being upon her feet in her then condition resulted in injury. During the afternoon, at least three people were with her, attending to her wants and offering farther assistance. Without requesting these attendants to perform the labor for her, she arose and swept the floor and washed her other children, with serious results to her physical well being. *Held* that, in view of the record evidence, this last act was unnecessary and her resulting injuries therefrom were not the proximate result of the failure to deliver the message.

(b) The husband arrived home July 21st. On or about July 25th, the wife arose from her bed and proceeded thereafter to perform her household duties. On August 1st following, she took her three children and unattended, traveled from Chicago to Cedar Rapids. The evidence showed it was detrimental to a woman's health for her to arise from her bed, after confinement, in less than ten days, and that the trip to Cedar Rapids would likewise be a factor detrimental to her health. The evidence tended to show a permanent displacement of the womb, not discovered, however, until nine months after the birth of the child. *Held*, under this record, that the failure to deliver the telegram was not the proximate cause of the displacement of the womb.

DAMAGES: Avoidable Consequences—Torts—Telegraphs and Tele-
4 phones—Failure to Deliver Message—Damages to Health. The doctrine of "avoidable consequences" has application to actions *ex delicto* as well as *ex contractu*.

PRINCIPLE APPLIED: (See outline facts above.) *Held*, the court should have explained to the jury what "necessity"

would have justified the wife in arising from her bed on the day following the birth of her child and what duty rested upon her to care for herself and thereby avoid unnecessary damages.

***Appeal from Linn District Court.*—HON. W. N. TREICHLER,**
Judge.

WEDNESDAY, FEBRUARY 17, 1915.

ACTION to recover damages for a failure to deliver a telegram. Opinion states the facts. Verdict and judgment for the plaintiff. Defendant appeals.—*Reversed.*

***Rickel & Dennis*, for appellee.**

Dawley & Wheeler, for appellant.

GAYNOR, J.—This is an action to recover damages for a failure to deliver the following telegram:

Dated CK.Chicago, Ill., July 18th, 1911.

To Harry Bernstein,
Care Republican and Times,
Cedar Rapids, Iowa.

Am sick. Come if you can. Wire if coming.

Beatrice. 3.13 P.M.

It is claimed that on the 18th day of July, 1911, Beatrice Bernstein, the wife of the plaintiff, prepared and sent this telegram to her husband at Cedar Rapids, Iowa; that the charges for sending the telegram were prepaid by her; that the defendant carelessly and negligently failed to forward and deliver the message as requested and directed; that it was guilty of gross and excessive carelessness and negligence in failing to so do; that Harry Bernstein named in the telegram was in the employ of the Republican and Times, at Cedar Rapids, and that if said message had been forwarded

with ordinary care and promptness, plaintiff would have received the same.

It is further claimed by the plaintiff that, at the time of sending said message, the said Beatrice, his wife, was threatened with immediate confinement, and that it was a matter of importance that the telegram be forwarded and delivered promptly to him; that on the same day on which the message was delivered to be sent, she was confined and gave birth to a child; that she was left without any care or anyone to look after her; that she was expecting every moment that her husband would arrive in response to the telegram; that the telegram not having been delivered, he did not reach her in time to furnish her assistance, and was unable to do so until about the 20th or 21st of July; that by reason of the failure to deliver said telegram, the said Beatrice suffered great physical pain and mental anguish, and her life was in danger; that she had two small children in the house with her, with no one to look after her or assist her; that her claim for damages, resulting from a failure to deliver said telegram, has been assigned to this plaintiff, her husband; that the plaintiff did not arrive in Chicago until the 21st day of July, 1911. Wherefore plaintiff asks judgment for \$2,000.00.

Defendant's answer is a general denial.

Upon the issues thus tendered, the cause was tried to a jury, and a verdict rendered for the plaintiff. Judgment having been entered upon this verdict, defendant appeals.

It appears that at the time the telegram was sent, to wit, July 18, 1911, plaintiff's wife resided at 1217 West Adams St., Chicago; that the plaintiff, her husband, was then in Cedar Rapids, Iowa; that the plaintiff had been in Cedar Rapids about six or eight weeks at this time, working on the Times Republican as street advertiser for the newspaper. It appears that some arrangement had been made between the plaintiff and his wife, in contemplation of her confinement, that she was to send him a telegram as soon as she knew she was going to be confined, and that he was to make arrange-

ments for somebody to be with her. It appears that on the afternoon of the day of her confinement, she talked with a physician for the purpose of ascertaining when the child would be born. Thereafter, she went around the corner about a block and a half from her place, and telephoned the doctor and told him the condition she felt herself to be in, and told him to call as soon as he could at the house. The doctor came about half past eight, made an examination and said there wouldn't be a birth until morning. Then she immediately wrote the telegram in controversy to her husband, and asked him to come, as therein stated, and after writing it, she gave it to a little boy who lived downstairs in the basement, and told him to take it to the Western Union Telegraph office, which was accordingly done; that the baby was born at 11.30 that night; that she got no response to her telegram, and her husband did not come. When she talked with the doctor at half past eight, the doctor told her it might come before morning, but he could not tell just how soon; that if her husband had received the telegram he could have arrived at seven o'clock on the morning of the 19th; that at the time the baby was born, the doctor and a Mrs. Eaton, who lived in the basement, were present.

Then in response to questions asked her by her counsel, she detailed the condition that her bed was in on the morning of the 19th at seven o'clock, as follows:

Q. "Now tell the jury what condition that bed was in the next morning at seven o'clock."

A. "Well, the bed was all soiled from top to bottom, and we were both, me and my baby, in a terrible condition at the time."

Q. "Tell the jury what your condition was and how you felt from seven o'clock and onward. Tell the jury what your condition was, and how you felt there in the bed as it then was."

A. "Well, I felt terrible. There was no way for me to move."

Q. "Tell the jury what the condition of your night clothes was, whether or not they were soaked with blood."

A. "Yes, sir. My night clothes were all soaked with blood, and the bed and sheets were all soaked all the way through."

Q. "That was from seven o'clock onward, (meaning seven o'clock on the morning of the 19th following the birth of the child)."

A. "I was in that way until noon in the same bed. I expected my husband about seven o'clock in the morning and I waited until ten and he didn't come, and I had to crawl out of the bed and crawl to the window and call out the window to the little boy, Mrs. Eaton's boy, and he came, and I sent him to the store to get some rolls and milk to feed the two children."

Q. "Tell the jury about the children—whether they needed attention that afternoon or not."

A. "They were crying for breakfast and were not dressed, and I called for the boy to get the rolls and milk and I sat up in bed and fed them. They didn't get washed that morning."

Q. "Tell the jury how you felt after you got up and called the boy and went back to bed."

A. "I felt bad. I felt as though things were running away from me, and I fell back in bed."

Q. "Tell the jury whether or not it was easy for you to go to the window and back again."

A. "It was all I could do to drag myself to the window and get back again, and it started me to flowing and it got real heavy and I couldn't hardly stand it."

Then she was asked the question: "The fact that your husband was not with you—tell the jury what effect that had upon you, both mentally and physically."

A. "Of course I felt bad and worried to think that I was there and he wasn't there."

Q. "How about crying and grieving for your husband?"

A. "I had been crying all the morning."

All these questions were objected to as immaterial, irrelevant, and incompetent, and objections were overruled.

She then stated that when the little boy came back from the store, she sent for the woman that did the washing; that the woman came about noon, and she asked her if she would mind taking the bed clothing and washing it and changing the bed. She took and changed the bed and took the soiled clothing and took it home. She was there until one o'clock, and from that time on, I was most of the time alone. In the afternoon, Mrs. Eaton came up and sat with me. She couldn't do much. She had a little baby of her own.

Q. "State whether you had to go to the toilet room from seven o'clock in the morning until evening, a great many times."

A. "Yes, sir. I had to get out of bed each time and go to the toilet room. That was a great many times. The toilet room was about eight or ten feet from my bed."

Q. "After you got back from your trips to the toilet room, tell the jury how you felt."

A. "Each time I stood on my feet it started the hemorrhage, and I felt bad every time I got out of bed."

Q. "Was there anyone there to look after you or your bedding or anything? Was there anyone to attend you after seven o'clock in the morning until evening?"

A. "No."

Q. "Had you in the afternoon to get up for anything or any purpose aside from going to the toilet room?"

A. "The children had been there all day, and towards evening the room got in such a terrible condition I could not stand it, and I got up and swept it. Then I got a pan and washed the children's faces and hands and put them to bed. I felt very weak after doing that. I couldn't raise my head

up then for a few minutes. Had to lie down. Each time I got up, the hemorrhage was as before but not so much as the other times."

All these questions were objected to for the same reason as before.

The witness then stated: "I had a nurse engaged from the Visiting Nurses Association, and I asked the doctor to telephone that night for her, and he said it wasn't necessary for him to do it. My husband would do it when he came. I did not telephone. No one came, and I had the boy telephone and she couldn't come until afternoon. This was on the afternoon of the 19th, and after the boy got back with the lunch for the children. I had the boy phone for the nurse the same time he phoned for the washerwoman. The nurse said she couldn't come then. She came in the afternoon, but didn't do anything for me. The washerwoman had changed my bed and bed clothing when the nurse came. The visiting nurse said she would come the next morning and take care of the child and myself. It was before the visiting nurse came that I got up and washed the children and swept the floor. The nurse came the next morning at eight o'clock. She stayed long enough to wash the baby and change my bed. We had made arrangements for the nurse to come in the winter. I wasn't expecting the nurse until after the baby was born. I sent word to the nurse that the baby was born on the morning of the 19th."

On cross-examination she said: "The nurse came about four o'clock and stayed only a few minutes. There wasn't much done. She stayed only a few minutes. The washerwoman had changed the bed. I swept the room after the nurse came there. The nurse doesn't do such things as sweeping. These nurses do their work for charity, not for pay. These nurses work from eight until five. On the morning of the 20th, she came about eight o'clock and stayed about an hour. She just washed the baby and changed my bed. She

came again on the 21st about eight o'clock. My husband was then there. He got there about seven o'clock on the morning of the 21st, and stayed until the 25th. The nurse came every morning about eight o'clock, took care of the baby until the baby was eight days old. My husband went back to Cedar Rapids when the baby was eight days old. I was up and around when my husband left. He left when the baby was eight days old. I remained out of bed after he left. I was so my husband could leave me, and he left me on the 25th, and the nurse was not required, and did not come any more after that time. From that time on, I did what work there was to be done. I left Chicago the 1st of August. The baby was then two weeks old, and I came to Cedar Rapids and have been there ever since. I came alone and my husband did not come in to meet me. I wrote a letter to my husband on the morning of the 19th and Mrs. Eaton mailed it for me. It was sent by special delivery. On the night of the 19th, I sent another telegram to my husband. On the same evening, I got an answer to this message from my husband. I sent a telegram back when the boy delivered the message."

The plaintiff testified that he had some arrangement with his wife to let him know when she was likely to be confined; that he visited the telegraph office on the evening of the 18th until two o'clock of the morning of the 19th; that his work was done at night. "I told the officer in charge of the office that I was expecting a telegram. I said that in case he got a telegram to rush it to me at the Times Republican. On the 27th I got a duplicate of the telegram sent on the 18th. It was handed me by the clerk in charge of the defendant's office. The first I heard that my wife was sick was on the evening of the 19th. That evening I took the newsboys to the Air Dome. It was after I got the boys seated that I got the telegram. I think it was about 8:30 or 8:20. I didn't receive any letters or telegrams or cards."

He testified further: "The physical condition of my wife isn't very well since that time. I took her to a doctor

at Cedar Rapids. I see a little change. I see that she isn't feeling right as she always has been before she gave birth to the child. She can't walk the street but what she complains. She walks on rocks, and she is crying. She was a woman of good health. She complains that something dropped on her below the abdomen."

Thereupon the doctor was called who made the examination testified to by the plaintiff. He testified: "I made the examination yesterday. She came to my office. I have found the woman not in a normal condition. I made the usual and ordinary examination to find out what the trouble was. The patient is a fleshy woman. The muscles of the abdomen are more or less relaxed. That is not good tone. The womb is displaced backward, and is lower down than it should be."

He was asked this question: "In what way does that affect the womb, the physical displacement of the womb such as you find in Mrs. Bernstein?"

A. "My judgment would be that a case similar to hers, if properly treated for a period of time, good results would follow. I think it is a condition that could be greatly improved by treatment. My judgment is, that by long treatment she would be greatly improved but I don't think she would be perfectly well."

He was then asked the following hypothetical questions:

"Assuming that Mrs. Bernstein gave birth to a child about 11:30 on the night of July 18, 1911, and assuming that the doctor who attended her left about twelve o'clock, or a short time after the child was born, that the doctor changed the sheet under Mrs. Bernstein before he left; assuming further that Mrs. Bernstein from the time that she gave birth to the child and after the doctor left and up to about ten o'clock on the next day, bled quite profusely, and that about ten o'clock the next day, she got out of bed and walked or crawled to a window close by, got up on her feet and called to a boy and went back to bed again and after she got in bed she felt quite sick and faint, more so than before she got out

of bed; and assuming that on the evening of the next day, the 19th of July, she walked to a toilet room close by, then opened it and went back to bed and bled quite profusely, that she bled further after she come from the toilet room and got back to bed, assuming all those things to be true, and assuming further that she had given birth to two children and after their birth had never been troubled with any female complaint or womb trouble, and that on the examination made by you yesterday you found her womb displaced and the cords supporting the womb in disorder and more or less stretched, and assuming that afterward from about eight days after she gave birth to this child, she had been troubled more or less with female trouble, what would you say in your opinion was the cause that brought about the condition of her womb that you found yesterday?"

A. "My answer would be this, my judgment would be that it was her getting up out of bed immediately following the delivery of the child."

Q. "Tell the jury what happens, how it affects the womb when a woman gets out of bed the next day after giving birth to a child."

A. "Well, at the time of childbirth of course the womb is enlarged to the greatest size possible, and as a result of that increase in size, there is an increase in weight, and if at that time a woman gets out of bed the weight is more and the strain of labor more, and she is liable to produce on herself a permanent injury from that condition, because of the increased weight of the womb and the relaxed condition of the cords."

Q. "Assuming, as I stated to you in the hypothetical question, she had to get up several times the next day after giving birth to this child, and go to the toilet room and several other places, what would you say as to her getting upon her feet, in what way would that cause hemorrhage to take place, if you know?"

A. "A woman who would get on her feet the following

day after labor would be subject to hemorrhage because the blood vessels have not completely contracted, the muscles have not had sufficient time to contract and as a result, the blood vessels are liable to ooze and she would be subject to hemorrhage."

The doctor on cross-examination testified that if a woman gets up earlier than ten days after the birth, it is liable to be injurious to the average woman; that getting up earlier than that is getting up too soon, and would be apt to increase the difficulties that he found existing. "If she got up and stayed up after the baby was eight days old, and when the baby was two weeks old traveled with three children from Chicago to Cedar Rapids, it would have an effect on her system, and I would not be able to state how much of her present condition is due to what she did immediately after the baby was born and what she did after the baby was eight days old."

Harry Bernstein, the plaintiff, being recalled stated: "I would have gone to my wife immediately if I had received the telegram first sent. I could have reached there by seven o'clock on the morning of the 19th. I did not arrive in Chicago in response to that telegram I received until seven o'clock on the 21st. I answered the telegram, however, and told her that I couldn't be home until the next evening. That would be the evening of the 20th. I did not, however, leave Cedar Rapids until the night of the 20th."

Mrs. Anna Eaton, called on behalf of the defendant, testified that she lived in the same building with plaintiff's wife; that she had the basement flat; that she was acquainted with her six weeks before the baby was born; that on the evening before the baby was born, between seven and half past seven, Mrs. Bernstein came to her rooms and told her that she thought she would be sick; that she thereafter telephoned for the doctor; that she, Mrs. Eaton, went back home with her and stayed until after the doctor had left, and until after the baby was born. "My son took a telegram to the office

for her. He was twelve years old. The telegram was sent probably an hour and a half or two hours before the baby was born." She testified, "It was about half past one in the morning when I got downstairs. I went up again the next morning about seven or a little after. I inquired of her if there was anything that I could do for her, and I did whatever I could. She was expecting a nurse in the morning. Mr. Eaton had telephoned for the nurse a little before eight in the morning. In the afternoon, I went up there every half hour. Every twenty minutes or thereabouts, I was up and down. I asked Mrs. Bernstein when I went up if there was anything I could do. She made no complaint and did not ask me to do anything. Said nothing about the children being hungry. I sent my boy up to see if there was anything she needed. He stayed there and tried to keep the children quiet. She didn't ask me when I was there to sweep the floor. I did what was necessary. I took care of everything."

This testimony of Mrs. Eaton is not contradicted by Mrs. Bernstein, except in her cross-examination she said, "On the morning of the 19th, there was no one came up until about ten o'clock," and further, on direct examination, "In the afternoon, Mrs. Eaton came up and sat with me, but I was there most of the time alone, she couldn't do much, she had a little baby herself, and didn't have much time." She nowhere says that she ever requested Mrs. Eaton to assist her, or that Mrs. Eaton ever refused to render her service when requested. She further testified on direct examination, "The children had been there all day, and towards evening the room got in such a terrible condition I could not stand it, and I got up and swept it; then I got a pan of water and washed the children's faces and hands and put them to bed." She says that this act caused a hemorrhage.

She further testified: "The nurse came in the afternoon but didn't do anything for me that afternoon. I swept the floor after the nurse came there. She stayed only a few

minutes. I didn't ask her to stay longer. I didn't ask her to come in the evening."

This much of the testimony we have set out as material to a proper understanding of the questions raised on this trial and disposed of in this opinion. We have attempted to set out no testimony concerning which there is any controversy in this record, except as indicated herein.

Much controversy has arisen as to whether an action of this kind is based on contract or tort—whether it is *ex contractu* or *ex delicto*. We think that, under the decisions of

1. TELEGRAPHS
AND TELE-
PHONES: fail-
ure to deliver
message: dam-
ages: nature
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tort.

this court, the action may be based upon a violation of the contractual duty which a telegraph company owes to the sender of the message, or it may be based upon the general legal duty that all companies of this kind owe to the public in their dealings with the public.

The action may sound in contract or it may sound in tort. The party may waive the breach of contract and sue for damages based upon the legal wrong—the tort involved in the act. Actionable negligence is always based on a violation of some duty, whether that duty arises from contractual relationships existing between the parties, or whether the duty is imposed upon the wrongdoers by the law itself.

An examination of the pleadings in this case satisfies us that the action sounds in tort; that recovery is sought for the negligent and careless discharge of a legal duty which the

2. TELEGRAPHS
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defendant owed upon the receipt of the telegram for transmission. The plaintiff alleges that the defendant was guilty of gross and excessive carelessness and negligence in failing, as it did, to forward the telegram to the party to whom it was addressed. Therefore,

in the consideration of this case, the rules which have been well established, governing the rights of parties in suits based upon actionable negligence, will be applied, and will control the determination of this case.

It has been established by a long line of decisions that mental pain and suffering, shown to be the proximate result of a failure to deliver a telegram, is an element of damage for which recovery can be had. See *Mentzer v. Telegraph Co.*, 93 Iowa 752, which has been followed in this court consistently, though not allowed in many of the other states of the Union.

It is claimed, however, that the plaintiff in this action was allowed to recover damages which were not the proximate result of the negligence of the defendant in failing to deliver the telegram, and this is the first assignment of error, and alleges: (1) That the delay in forwarding the message was not the proximate cause of the injuries complained of. (2) That the injuries complained of were not within the contemplation of the parties when defendant undertook to forward the message. (3) That there was no mental anguish shown for which damages can be allowed.

8. DAMAGES: as
contractu: as
delicto: dis-
tinction: con-
templated
damages:
proximate re-
sults: tele-
graphs and
telephones.

Upon these assignments, we have to say that where the action is founded on tort, it is not necessary that it should appear that the damages sustained were such as were reasonably within the contemplation of the parties at the time the defendant undertook to forward the message. That would be true in the absence of the statute if the action rested upon a breach of contract only. In actions founded upon a breach of contract only, the plaintiff is entitled to such damages as are shown to be the proximate result of the breach, and only such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as a probable result of its breach, but this is not the rule in actions founded upon tort. In actions on tort, the compensation allowed is not only for such injurious consequences as proceed immediately from the cause, which is the basis of the action, but consequential damages as well, whether they be or be not in contemplation of the parties at the time the contract is made. But in either case, the damages to be recovered must be traceable directly, without any intervening

independent cause, to the original cause alleged as the basis for the damages. That is, so far as the damages are compensatory, the act complained of must be the proximate cause of the injury out of which the damage arises. As stated in the books, in actions of tort the party complaining can recover for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force.

It is true that Sec. 2163 of the Code provides: "The proprietor of a telegraph . . . line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing, or any other duty required by law, the provisions of any contract to the contrary notwithstanding."

In saying that the company is liable *for all damages* resulting from a failure to deliver a message, it is evident the legislature did not intend to make the company liable for other damage than that of which the failure was the proximate cause, either direct or consequential. This holding is not inconsistent with *Barker v. Western Union Tel. Co.*, 114 N. W. 439 (Wis.).

This Wisconsin statute, construed in *Barker v. Western Union Tel. Co.*, *supra*, is substantially the same as our statute. The decision in the *Barker* case is simply a following of the pronouncement of that court in the case of *Fisher* against the same company, 119 Wis. 146, reported in 96 N. W. 545. The *Fisher* case follows the case of *Cutts* against the same company in 71 Wis. 46. Under the construction placed upon this statute by these Wisconsin cases, it is held: "It is only necessary, as to any particular result, that it shall have been a natural consequence of the injury, having regard to the usual course of nature and of cause and effect in line of unbroken physical causation," thus making applicable to all cases of this kind the rule hereinbefore stated governing

actions in tort, and relieving the plaintiff from showing (whether the action be founded on contract or tort) that the loss was in contemplation of the parties at the time the contract was made. The construction placed upon this statute does not relieve the plaintiff of the burden of showing that the injurious consequences, following the failure to deliver the telegram, proceeded directly or as a natural consequence from such failure. Nor does it relieve the plaintiff from the burden of showing that the damages sought to be recovered are traceable directly, without any intervening independent cause, to the original cause alleged as a basis for the damages.

In *Fisher v. Western Union, supra*, the court quoted with approval from *Summerfield v. Western Union Telegraph Co.*, 87 Wis., page 1, as follows: "We cannot regard the statute as creating, or intending to create, in any way, new elements of damage. . . . Had a radical change in the law relating to the kind of suffering which should furnish a ground for damages been contemplated, the act would have expressed that intent in some unmistakable way." The court further said: "The point involved there, (that is, in the *Summerfield* case), was, whether loss attributable to injured feelings only was recoverable. The decision was based upon the doctrine that all injuries causing measurable damage, having some proximate relation to the injury, can be recovered; that in the absence of any physical injury, by common law rules, there is no such proximate relation, and the legislature did not intend by the statute to displace that doctrine. We see no reason for departing from that view. Where there is a proximate relation in the common law sense, between an injury caused by a failure of duty on the part of the telegraph company in the cases mentioned in the statute, and the injurious results, if there be such, the party is entitled to recover compensation for such results under the statute, whether the form of action be on contract, or for a breach of duty constituting actionable negligence."

So far as damage is concerned, the only difference between

an action for a breach of contract and an action resting in tort is, that in actions for a breach of contract, the damages recoverable must have been reasonably within the contemplation of the parties. In actions in tort it is not necessary that this element should exist. But in either case, the damages recoverable must be the natural and probable consequence of the conduct of the wrongdoer. The conduct complained of, and the consequences which follow, resulting in damages, must be connected directly or by an unbroken chain of successive events, each dependent upon the other. Or, in other words, where an actionable injury has been suffered, it is only necessary in actions in tort that the consequences, the results, shall be a natural consequence of the injury, having regard, as hereinbefore said, to the usual course of nature in matters of that kind, and of cause and effect, in a line of unbroken physical causation. This makes the proximate relation between damage and injury. But, however, in considering all these questions, we must distinguish between the result, as it has relationship to the injury, and the result as applied to the proximate consequences of the injury.

In the case at bar, therefore, following the rules hereinbefore stated, and recognizing and giving force and effect to the statute hereinbefore noted, we hold that the plaintiff is liable, in this case, for all damages which resulted from the failure to perform its legal duty; for all damages flowing from said wrong, both direct and consequential, but for only such injury or damage as the failure of the defendant to discharge this duty is shown to have been the proximate cause, whether it was apprised of the nature or importance of the telegram or not, and though the damages may not have been in contemplation of the parties at the time the message was delivered for transmission.

This holding disposes of much of the argument made in this case, and dispenses with the consideration of those cases in which it was held that the action was based on breach of contract.

This statute, no doubt, was enacted for the purpose of relieving from the embarrassment and difficulty, which existed under our form of pleading, in determining whether the action was based on contract or on tort, and for the purpose of fixing the same rule of damage in either case.

We proceed now to determine whether or not, under this record, any of the damage which plaintiff claims to have suffered is shown to have been the proximate result of the negligence of the defendant in failing to transmit the message promptly and without unreasonable delay; whether there was or was not some independent, intervening cause which broke the continuity of causation between the act complained of and the injury suffered.

We find in this record evidence from which the jury might well have found that if the defendant had transmitted the message as was its duty to do, the plaintiff could have arrived and been with his wife shortly after seven o'clock on the morning of the 19th; that he did not receive the message, and, therefore, did not arrive. That he did not arrive was known to his wife shortly after seven o'clock. She could not then know whether he had received the message or not. Assuming that relationship existed between these parties such as ordinarily exists between husband and wife, she had reason to believe that he had not received the message, for the message itself requested an answer. She did know, however, the fact that he did not respond to the message, even though she did not know the reason. It appears that about ten o'clock she called the little boy, twelve years old, who resided with his parents in the basement of the building occupied by her, and sent him on an errand for food. Conceding that her effort to procure the service of this boy, as testified to by her, was made necessary by the failure of her husband to arrive at seven o'clock, and assuming that she sustained some injury by reason of this effort, yet it appears that on this same day, the 19th, the washerwoman arrived about noon, changed her bed clothing, took the soiled clothing from the room, and remained

there until about one o'clock; that in the afternoon Mrs. Eaton came up and sat with her; that the nurse came about four o'clock of the same day; that after this, and after an opportunity to secure the services of these people had passed, and without requesting their services, although Mrs. Eaton says she was willing to serve her, and offered services—and this is not denied by the plaintiff—and after she had experienced the effect of rising on her feet in the morning at the time she called the boy to get food for the children, she got up and swept the floor, got a pan of water and washed the children's faces and hands and put them to bed.

This apparently was a voluntary act on her part, an unnecessary act in view of the situation. This is an act which she claims produced serious injury to her, and this is the injury for which, in part, she was allowed to recover in this action.

We think there was an independent, intervening cause for this injury, breaking the continuity of the chain of causation between the alleged wrong, on the part of the defendant, and the injury sustained. If we take the undisputed record in this case, this act of hers was done whimsically or through caprice. It is no more chargeable to the negligent act of the defendant than if she had, while in her right mind, under the same circumstances, and with the same environment, severed her right hand from her wrist. The act of rising from her bed, while in her then condition, and doing this work, knowing from experience the consequences that must follow, was her own voluntary act, without reason or cause for the doing, and the resultant injury was directly traceable thereto. The failure of the defendant to send the telegram to her husband cannot be the proximate cause of this injury, if any.

Again, the plaintiff was allowed to recover for permanent injuries based upon the fact that there was a permanent displacement of the womb, traceable directly, or as a natural consequence, to the failure of the defendant to send the telegram to her husband.

She testifies that she arose from her bed and went about her ordinary household work and caring for three children, on or before the 25th day of July. It appears that her husband left for Cedar Rapids on the 25th, and she said she was up and about when he left; was doing her own work and had discharged the nurse as unnecessary; that thereafter and about the 1st of August, she traveled in company with these three children, without anyone to assist her, from Chicago to Cedar Rapids. It does not appear that she received any treatment for any ailment after reaching Cedar Rapids at any time. She claims that she first discovered the trouble in the region of her womb about two months after she reached Cedar Rapids. When she was first on the stand, as a witness for herself, she did not testify to any trouble with her womb or internal organs except such as she experienced the day following the birth of the child.

It appears that, on the trial of this cause, a doctor was called for the plaintiff who, when sworn for examination, testified: "I examined Mrs. Bernstein yesterday. She came to my office and I asked her questions." After the doctor had left the stand, Mrs. Bernstein was recalled for a further examination by the plaintiff, and was asked this question: "Now, how soon, Mrs. Bernstein, after you came to Cedar Rapids and after you left Chicago, was it that you commenced to feel ailments with reference to and in the region of your womb and internal organs?" She answered, "About two months after."

The doctor in his testimony stated that his examination showed a displacement of the womb. The doctor's examination of Mrs. Bernstein was made about the time of the trial. The trial was commenced on the 8th day of May, 1912.

We have set out the substance of the doctor's testimony, and in that testimony the doctor stated on cross-examination: "The average time for a woman to stay in bed after confinement is from ten days to two weeks. If they get up earlier than ten days after the birth, it is liable to be injurious to

the average woman, I think that is the regular practice and the regular advice of physicians." The doctor further stated that in view of the conduct of Mrs. Bernstein as detailed by her, he was unable to say how much of her present condition was due to what she did immediately after the baby was born, and what she did after the baby was eight days old; that if she got up and stayed up after the baby was eight days old, and took a trip with three children to Cedar Rapids without any help, that would have an effect on her system. "I think it would be a factor."

While Mrs. Bernstein states that she did not get up until after the baby was eight days old, the record shows that she was up at the time her husband left, and her husband left on the evening of the 25th, which would be less than seven days from the time of the birth.

Upon this record the court submitted the question to the jury, as to whether or not Mrs. Bernstein had not only received injuries as a proximate result of the defendant's negligence in sending the telegram, but whether or not these injuries were permanent, and the permanency traceable directly to the wrongful act of the defendant. The court submitted this question in its seventh instruction in the following language: "You are further instructed that if you find that by reason of defendant's negligence, plaintiff's wife was compelled to get out of bed, and the getting out of bed injured her permanently, then in that event, you should allow her such further sum as you deem will compensate for such pain and suffering as it is reasonably certain she will endure in the future."

In the preceding instruction the court said: "Evidence has been given regarding Mrs. Bernstein's getting out of bed, and you are instructed regarding that feature of the case, that if Mrs. Bernstein was required to leave her bed the day following the birth of her child, and that she was injured in so doing, and you find that in all probability plaintiff would

4. DAMAGES :
avoidable consequences :
torts : telegraphs and telephones :
failure to deliver message :
damages to health.

have reached his wife before she was compelled to get out of bed and relieved her from the necessity of getting up, if the message had been delivered in a reasonable time, then you would be warranted in finding that defendant's negligence caused such injury."

These instructions are vague and indefinite. The words "necessary" and "compelled" are not limited in any way in dealing with the conduct of Mrs. Bernstein. The court, however, said, "You will be confined in your consideration to such acts of plaintiff's wife which were necessary by her husband's absence." Nowhere in the instructions were the jury told that any duty rested upon Mrs. Bernstein to exercise any care to protect herself from injury, or to lessen the damages which might follow from her want of such care, and to sum it all up the court said, "But if you fail to find by a preponderance of the evidence that, in all probability, the injury was by reason of her getting up the day after the birth of her child, (referring to the permanent injury), or if you find that the present condition of her womb might be caused, with as much certainty, by other acts or causes, then you should not attribute the present condition to the negligence of the defendant."

With this light to guide the jury in wandering through the maze of uncertain testimony, upon the question of the permanency of Mrs. Bernstein's injuries, and whether or not the condition, if any, found by the doctor upon his examination made during the trial was due to the defendant's negligence, the jury were permitted to say that in all probability the condition of Mrs. Bernstein's womb, found nearly nine months after the birth of the child, was traceable directly, or as a natural consequence, to the defendant's failure to send the telegram on the night of July 18, 1911.

We think there is no evidence which would justify the jury in finding, with that certainty which the law requires, that the condition of Mrs. Bernstein's womb was traceable, as a direct or consequential result, to the conduct of this defendant. It is the merest speculation, the merest guess, when

based upon this record, as to what caused her condition, as found by the doctor at the time of the trial, and we think the court erred in allowing the plaintiff to amend his petition, and in submitting to the jury for its determination as a probability, whether or not the injuries suffered by Mrs. Bernstein were traceable to the defendant's action as their proximate cause. There is no foundation in the evidence for the nice balancing of probabilities. Before a thing can be said to be probably true, as a result of a negligent act, it must appear that, in the natural course of nature, without any intervening, moving cause, the result usually and ordinarily does happen in the course of nature from such cause.

There are other matters complained of by the defendant on its appeal, but as they are either covered by what has been here said, or are such as will not arise on another trial, we do not give them consideration.

We hold that the court erred in allowing the jury to consider any physical injuries which Mrs. Bernstein sustained on the afternoon of July 19th, and in submitting to the jury, as a basis for recovery, the injury, if any, sustained by her, predicated upon her own conduct, under the circumstances, in arising from her bed on the afternoon of July 19th and in submitting to the jury, as a basis for recovery, as a probability, that Mrs. Bernstein's present condition is traceable directly to the defendant's act as its probable cause.

For the errors pointed out, the case is—*Reversed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

LAURA N. HUNT, Administratrix, Appellee, v. FREDERICK A. DELANO et al., Receivers of the Wabash Railroad Company, Appellants.

RAILROADS: Contributory Negligence—Crossing Accident—Facts

1 Reviewed. Evidence reviewed and *held*, question of contributory negligence was for the jury.

PRINCIPLE APPLIED: The "Q" railway tracks, in a thickly settled portion of the city, crossed a north and south street in a northeast and southwest direction; 120 feet south of this crossing the "Wabash" tracks crossed the same street in a direction northwest and southeast. The deceased coming south with a single horse and buggy approached the "Q" tracks; was warned to look out by one who heard a noise and thought it a train but had seen nothing. Deceased hurried over the "Q" track just behind a passing handcar; just then the "Wabash" freight, one hour late, and running 25 to 30 miles per hour in violation of an ordinance limiting speed to 6 miles per hour, appeared in sight at the tower 150 feet west and north of the intersection with the street. Deceased stopped his horse apparently 15 to 60 feet from the "Wabash" crossing but only momentarily, because the horse became unmanageable from fright; the train crossed the street crossing, the horse turned to the left parallel with the train, threw deceased out and under the train and he was killed. The view west of the tower was at least quite fully obstructed by trees and buildings. *Held*, that the question of contributory negligence was for the jury.

Appeal from Monroe District Court.—HON. C. W. VERMILION,
Judge.

WEDNESDAY, FEBRUARY 17, 1915.

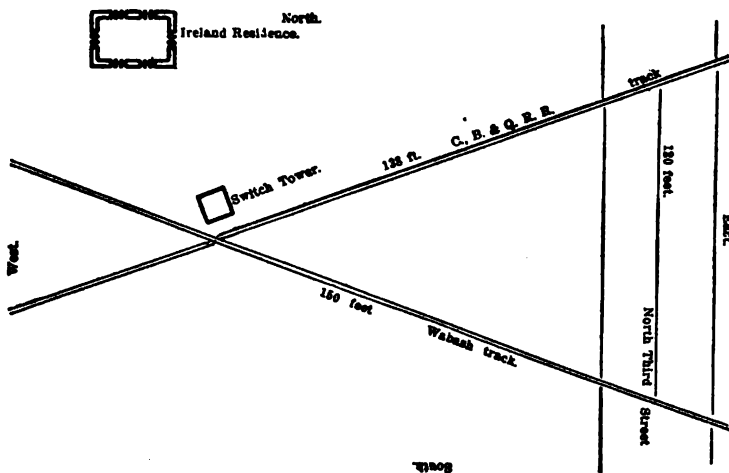
ACTION for damages for negligence resulting in the death of Lynch Hunt. There was a verdict and judgment for the plaintiff of \$2,000. The defendant appeals.—*Affirmed*.

Perry & Perry and N. E. Kendall, for appellants.

Mabry & Hickenlooper, for appellee.

EVANS, J.—The plaintiff is the administratrix of the estate of the decedent. The defendants are the receivers of the Wabash Railroad Company. The accident under consideration occurred on August 21, 1912, in the city of Albia, on Third Street at the point of intersection of such street with the Wabash railway. Third Street runs north and south. Decedent was approaching the railway intersection from the

north and was riding alone in a buggy drawn by a single horse. The railway line runs from northwest toward the southeast. The train involved in the collision was a freight train and was running southeasterly. One hundred twenty feet north of this intersection with the Wabash railway, the same street has an intersection with the C. B. & Q. railway (referred to in this record as the Q railway). The following diagram is sufficient indication of the *locus quo*:



The plaintiff's petition charged negligence in the speed of the train and in the failure to give warning by bell or whistle. It further averred that by reason of such negligence the

1. RAILROADS:
contributory
negligence:
crossing acci-
dent: facts
reviewed.

decedent lost control of his horse which he was driving from the north in the direction of the track and that while attempting to control the horse and protect himself he

turned the horse to the left and parallel with the track and was thereby thrown out of his buggy and against or under the third or fourth car in the train and was thereby killed. The answer was in substance a general denial and a plea of contributory negligence. Several assignments of error are

presented by the appellant but they all center upon one general contention, viz.: that the decedent was not shown to be free from contributory negligence and that it was conclusively shown as a matter of law that he was guilty of contributory negligence and that a verdict ought to have been directed for the defendant on that ground. The point was appropriately made at the close of the evidence and later in the motion for a new trial. The accident in question was witnessed by several witnesses. The train in question was running one hour late. When the decedent was driving south and when he was within a very few feet of the Q intersection he received a warning of "look out" from another teamster. The person giving the warning had heard a noise and believed that a train was coming but he had not seen it and did not then know upon which track it was coming. What the decedent understood by the warning above quoted is a matter of inference only. He quickened the pace of his horse either by a stroke of the whip or by the lines and appeared to hasten across the Q track. A moving handcar on this track was within his view and was allowed to pass the intersection ahead of him. Between this intersection and that of the Wabash railway was a distance of 120 feet. It is the contention of the defendants that from this point on he urged his horse forward in an effort to cross the tracks ahead of the approaching train and that he neither stopped, looked or listened nor took any precaution for his own safety. There is considerable evidence, however, that shortly after he had crossed the Q track the train came into view as it passed the tower 150 feet west of the intersection and that the decedent brought his horse to a "standstill" for a very brief time and then appeared to lose control of him by reason of his fright. The distance at which he actually stopped is put by the different witnesses at from 15 to 60 feet. Indeed a clear preponderance of the evidence shows that the horse was frightened and that the decedent was apparently unable to control him and that this occurred within the range of the distance already indicated. The horse turned

to the left and took the right of way parallel with the track. The decedent was thrown out of his buggy toward the train at a point on the right of way about 20 feet east of the intersection. The horse was not struck by the train.

It is urged for appellant that if the decedent had looked he could have observed the approaching train for a long distance west of the tower. The contention in argument at this point is much stronger than the evidence. The view was obstructed by buildings and many trees then in foliage. There may have been a point where an opening could be found but even this is by no means clear in the evidence.

It is urged for the appellant that the decedent was necessarily negligent in hastening across the Q crossing and in putting himself in a position of danger between the two crossings. But in hastening across the Q crossing he put himself in danger of collision only with the Q train. He did not thereby put himself in any danger of collision with the Wabash train. Surely it cannot be said as a matter of law that a man is guilty of negligence in driving an ordinary horse to a point within 60 feet or 15 feet of a train. True, he might be deemed negligent as a proposition of fact but this would not aid the contention of appellant. The place of collision was in a thickly settled part of the city. The ordinance limited the speed of trains to 6 miles an hour. According to plaintiff's evidence this train approached and crossed the intersection at a speed of 25 or 30 miles an hour. That the evidence was sufficient to support the charge of negligence against the railway company is not questioned.

Upon the record before us the question of contributory negligence was clearly one for the jury and the defendant was not entitled to a directed verdict thereon. Our previous cases in support of this holding are many. The following recent cases will be sufficient citation: *Case v. C. G. W. Ry. Co.*, 147 Iowa 747; *Warn v. C. G. W. Ry. Co.*, 149 Iowa 450; *Dusold v. C. G. W. Ry. Co.*, 162 Iowa 441; *Davitt v. C. G. W. Ry. Co.*, 164 Iowa 216.

No other errors are presented for our consideration. The judgment below must, therefore, be—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, ex rel NELS THOMPSON, Appellee, v. W. A. BOOTH et al., Appellants.

STATUTES: Construction—Intent—Substituting Words. The fundamental rule in construing a statute is to preserve every word thereof and to give such effect to all parts of the enactment as will reflect the legislative intention. To comply with this rule the court will, when necessary, give to a word a meaning different from its ordinary meaning when such was the manifest intention of the legislature, and it is necessary in order to preserve and give force to all words of the enactment. (See Supplemental Opinion.)

PRINCIPLE APPLIED: Sec. 2794-a of the Sup. Code, 1913, provides for elections to determine the question of consolidating territory into a school district and provides that "when it is proposed to include . . . a city, town or *village*, the voters residing upon the territory outside the *incorporated* limits of such city, town or *village* shall vote separately, etc.," and separate ballot boxes are commanded. Sec. 638, Code, provides that "town sites platted and *unincorporated* shall be known as *villages*." All other municipal corporations are cities and towns.

Held, the word "incorporated," if applied literally to the words "limits of a village," would eliminate the word "village" from the statute, because an "incorporated village" would be synonymous with "town." Therefore, in order to preserve all parts of the statute and not to subtract therefrom, the word "incorporated" when applied to the words "limits of a village" should be deemed to have the sense of "platted."

ELECTIONS: Separate Ballot Boxes—When Not Necessary—Schools and School Districts. The violation of a law requiring separate ballot boxes, in certain contingencies, does not necessarily render the election void.

PRINCIPLE APPLIED: Sec. 2794-a, Sup. Code, 1913, provides for an election to vote on the proposition of consolidating territory outside and inside of villages. Separate ballot boxes are required in which the ballots of the voters in their respective territory shall be deposited. A majority against consolidation in either territory defeats the proposition. In instant case, separate ballot boxes were not provided, but it was shown that every voter residing within the platted limits of the village voted in favor of the consolidation and a large majority of the voters residing outside such platted limits voted in favor of consolidation. *Held*, the election was not void.

Appeal from Polk District Court.—HON. W. H. MCHENRY,
Judge.

THURSDAY, NOVEMBER 5, 1914.

THIS is a proceeding in *quo warranto*. It is brought against the defendants as purported officers of a school corporation. It challenges the legality of the formation of such school corporation. The defendants filed an answer to the petition. The plaintiff demurred to such answer, and his demurrer was sustained. From such ruling the defendants have appealed.—*Reversed*.

Parson & Mills, for appellee.

George Cosson, Attorney General, *C. A. Robbins*, Assistant Attorney General, *Amicus Curiae*.

E. J. Kelly, for appellants.

EVANS, J.—1. The defendants are the purported officers of the consolidated independent school district of Alleman. The school corporation in question was organized under the provisions of Chapter 143, 34th G. A., in pursuance of an election held in January, 1914, wherein the majority of the electors voted in favor of such organization.

The legality of such election is challenged by the plaintiff because the territory included in such proposed school district included the village of Alleman and other outside territory, and the judges of election failed to provide separate ballot boxes for the respective voters within and without such village. It is made to appear from the answer demurred to that such village of Alleman is not an incorporated village, and has no "*incorporated limits*." It is further made to appear therein that such village had only seven voters and that all such voters voted in favor of the organization of such school corporation.

It is averred in plaintiff's petition that the village of Alleman was a "*platted village*." This allegation is put in issue only by a general denial in the answer, and we are disposed to assume the truth of such allegation for the purpose of this discussion.

The question presented for our consideration is, whether the election held was rendered void by the failure of the judges of election to furnish two ballot boxes at the election. This involves a construction of Chapter 143 above referred to. This chapter purports to be an amendment of Sec. 2794-a of the Code Supplement. Such chapter provides as follows:

"When it is proposed to include in such district a city, or town or village, the voters residing upon the territory outside the incorporated limits of such city, town or village shall vote separately upon the proposition for the creating of such new district."

It also provides that "the judges of said election shall provide separate ballot boxes in which shall be deposited the votes cast by the voters from their respective territories." It is further provided that if a majority in either territory shall vote against the proposition, then the same shall fail.

The first question presented, therefore, is, was it necessary to take account of the *platted* limits of the village of Alleman and to furnish two ballot boxes for the respective

territories within and without such *platted* limits? It will be noted that the statute refers, in terms, to "incorporated limits." It is a matter of general knowledge that the "incorporated limits" of cities and towns are often, if not usually, not co-extensive with their *platted* limits. The legal entity of a city or town is defined by its "incorporated limits" and not by its *platted* limits.

The village of Alleman had no "incorporated limits," because it was not incorporated. To substitute in such a case the *platted* limits for the incorporated limits would be to add something to the statute. We think, therefore, that the requirement for separate ballot boxes cannot apply to a village which has no incorporated limits.

We have no argument for the appellee. It might be urged in his behalf that under our statute there can be no such thing as an incorporated village as distinguished from an incorporated town, because an incorporated village is the statutory equivalent of an incorporated town. It is undoubtedly true that an incorporated village would be a "town" within the meaning of our statute. Code Sec. 638. In this sense, the use of the word "village," in the chapter referred to, is mere surplusage. The ordinary definition of a village is a small assemblage of houses, whether situated upon a *platted* district or not. See *Webster's Dictionary*; *Bouvier's Dictionary*; *Truax v. Pool*, 46 Iowa 257; *Mikael v. Equitable Securities Co.* (Tex.) 74 S. W. 67; *State v. Lammers*, 113 Wis. 398, 89 N. W. 501; *Illinois Central v. Williams*, 27 Ill. 48.

The statute under consideration, however, assumes the possibility of the creation of an incorporated village. Even though this be a mistaken assumption, or an erroneous terminology, it cannot have the effect to enlarge the application of the statute to a village not incorporated. We conclude, therefore, that the statute by its terms is applicable only to municipal corporations having "incorporated limits."

2. In view of the showing that the proposition to form the school district was carried by clear majorities both within

the village of Alleman and without the same, we are not prepared to say that the mere failure of the judges to furnish two ballot boxes at such election is sufficient, of itself, to render the election wholly void.

In view of our conclusion upon the first question considered, we need not pass upon this one. We think the demurrer to the answer should have been overruled.

The order sustaining such demurrer must therefore be reversed, and it is so ordered.—*Reversed*.

LADD, C. J., WEAVER and PRESTON, JJ., concur.

SUPPLEMENTAL OPINION.

WEDNESDAY, FEBRUARY 17, 1915.

EVANS, J.—I. Upon further consideration of the foregoing case on rehearing, it is the view of the majority that our holding in the first division of the opinion should be changed and that the term “incorporated limits” should be construed literally only as to incorporated cities and towns; that as to unincorporated villages it should be construed as the equivalent of “*platted*” limits. This construction adds something to the statute, whereas our former construction took something away. One construction or the other is unavoidable. The majority prefer addition to subtraction. It is thought also that our former construction might quite prevent a village from becoming the center of a consolidated district.

1. STATUTES :
construction :
intent : sub-
stituting
words.

We hold, therefore, that the statute ought to be deemed applicable to unincorporated villages and that the limits of such villages are to be ascertained from the *plating* thereof.

II. On the question considered in the second division of the opinion, it was made to appear affirmatively that the vil-

lage in question had seven votes and that these were all cast in favor of the consolidation. It was also made to appear affirmatively that a clear and large majority of the votes cast from outside the village was in favor of such consolidation.

In the presence of such a showing, we are of the opinion that the election was not rendered void by the mere failure of the judges to furnish two ballot boxes. The former order of reversal is adhered to. But the ground of such reversal is changed as herein indicated.

STATE OF IOWA, ex rel JOHN B. HAMMOND, Appellant, v. MRS. MAURICE LYNCH, Appellee.

CONSTITUTIONAL LAW: Statutes—Bills—Passage—Evidence—

- 1 **Failure of Speaker to Sign Enrolled Bill.** The final, conclusive, ultimate and only evidence of the passage of a "bill" by both houses of the legislature is the enrolled bill signed by both the president of the Senate and the speaker of the House. Sec. 15 of Art. 3 of the Constitution, providing that "every bill having passed both houses shall be signed by the speaker and president of their respective houses," is necessarily mandatory.

Appeal from Polk District Court.—HON. HUGH BRENNAN, Judge.

WEDNESDAY, FEBRUARY 17, 1915.

A demurrer to a petition praying that a nuisance be enjoined was sustained and, as plaintiff failed to plead over, the petition was dismissed. The State appeals.—*Affirmed.*

George Cosson, Attorney General, *C. A. Robbins*, Assistant Attorney General for the State, *Schenk & Lehmann*, for appellant.

Parsons & Mills and *Dunshee & Haines*, for appellee.

LADD, J.—The petition alleged that Mrs. Maurice Lynch was maintaining the premises described, leased by her of her co-defendant, as a place of lewdness, assignation and prosti-

1. CONSTITUTIONAL LAW: statutes: bills: passage: evidence: failure of speaker to sign enrolled bill.
- tution in violation of law and prayed that she be restrained from so doing. The defendant demurred to the petition on several grounds, only one of which is argued, and that is that Chapter 214 of the Acts of the Thirty-

third General Assembly, as the same appears among the enrolled bills in the office of the secretary of state, though duly signed by the president of the senate and approved by the governor, was never signed by the speaker of the house of representatives. An inspection of the bill as it appears in the office of the secretary of state verifies the allegation and, of course, the demurrer admits it. If the signature of the speaker of the house of representatives as well as that of the president of the senate was essential to the authentication of the bill as having passed the general assembly, Chapter 214 as printed in the session laws of 1909, under which this suit was begun, cannot be deemed to have been enacted by that body and did not become the law of this state.

The provisions of the constitution bearing thereon are found in Article 3. Sec. 9 thereof declares that: "Each house shall . . . keep a journal of its proceedings, and publish the same." Sec. 10: "The yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals." Sec. 15: "Every bill having passed both houses, shall be signed by the speaker and president of their respective houses."

Sec. 16. "Every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of

two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him (Sunday excepted) the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof."

Sec. 17. "No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."

The authorities agree that the bill, when signed, as exacted by the speaker of the house and president of the senate and approved by the governor and deposited with the secretary of state, is at least prima-facie evidence that it was passed by the legislature; but many courts entertain the view that it is within their jurisdiction to ascertain whether the authentication as thus made is correct, and whether the legislature in fact did what its presiding officers say it did, and what the governor approved, and for that purpose to resort to the journals of the respective houses and even consider other evidence bearing on the question. See *State v. Swan*, 7 Wyo. 166, 75 Am. St. 889 and cases therein cited; *Rode v. Phelps*, 45 N. W. (Mich.) 493; *State v. Frank*, 83 N. W. (Neb.) 74; *State v. Deal*, 4 So. (Fla.) 899; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571.

Other authorities are to the effect that while the constitution has prescribed the formalities to be observed in the passage of bills and the creation of statutes, the power to determine whether these formalities have been complied with

is necessarily vested in the legislature, and a bill having been authenticated and promulgated by the legislative department to the public in the manner authorized by the constitution, this is conclusive evidence of its proper passage by the legislature. As all decisions entertaining the latter view exact, as essential to the authentication of the enrolled bill and proof of its passage, the signatures of both the speaker of the house and president of the senate, inquiry as to whether we may look beyond the enrolled bill to ascertain whether it is in fact a statute of the state is pertinent. The expressions contained in the opinions of this court are in harmony with the authorities declaring the enrolled bill conclusive. In *Clare v. State*, 5 Iowa 508a, 509, the question was as to whether the enrolled bill in the office of the secretary of state or as published in the session laws was controlling and the court said: "The original act in the secretary's office is the ultimate proof of the law, whatever errors there may be in what purports to be copy thereof; and the court will inform itself and take cognizance of the true reading of the statute."

In *Duncombe v. Prindle*, 12 Iowa 1, the question involved was whether township 90 was taken from Webster county and added to Humboldt county, and it was contended that the number "90" was omitted by mistake from the act as published but appeared in the original bill. The court, upon examination of the enrolled bill, found this not to be so and added: "This enrolled bill, thus filed and preserved in the secretary's office, is the authenticated copy of the real bill which the General Assembly passed, and is the ultimate proof of the true expression of the legislative will, as this court has before held: *Clare v. The State of Iowa*, 5 Iowa 510. And that for the obvious reason that it is the bill which received the signatures of the officers of both branches of the legislature, after a committee appointed for that purpose had compared it with the law as passed, and reported it a correct copy of the same. Behind this it is impossible for any court to go for the purpose of ascertaining what the law is. There is no

other bill, original or a copy, to which the signatures of the President of the Senate and Speaker of the House of Representatives are affixed, or to which is appended the approval by the Governor. And when counsel speak of some other original bill than this, in which the township 90 was embraced, we confess we are at a loss to conceive what they mean. Are we to suppose that the enrolling clerk, and the committee appointed to examine and report upon the accuracy of his work, have all been guilty of laches or corruption, especially in the absence of any competent proof to that effect?"

Though not involved in *Koehler v. Hill*, 60 Iowa 543, the court in the course of its opinion, observed that: "Inasmuch as a bill, before it becomes a law, must be signed by the presiding officers of the two houses and by the governor as will be assumed, we may, for the purpose of this case concede, if it has been enrolled and so signed, and deposited in the office of the secretary of state, it is the ultimate and conclusive evidence of the contents of the bill which passed the General Assembly and cannot be contradicted by the journals because there are no constitutional provisions requiring that it shall be entered on the journals." And further on, at page 563, it was said: "For fear we may be misunderstood, we will repeat that, when a bill or joint resolution is required to be signed by the presiding officers and the governor and it is so signed, it will be conceded that such bill or resolution constitutes the ultimate and conclusive evidence of the contents thereof."

In *Darling v. Boesch*, 67 Iowa 702, the bill was presented to the governor for his approval during the last three days of the session of the general assembly and he did not sign it, and merely deposited it in the office of the secretary of state without objection thereto within thirty days, and the court held that it did not become a law.

In *Miller v. City of Oelwein*, 155 Iowa 706, it was declared that, "The enrolled bills duly signed and deposited with the secretary of state constitute the ultimate proof of

their regular enactment, and behind them it is impossible for any court to go for the purpose of ascertaining what the law is." *Duncombe v. Prindle, supra*, and *Collins v. Laucier*, 45 Iowa 702, were cited and also *Western U. Tel. Co. v. Taggart*, 141 Ind. 281; 60 L. R. A. 671. But later on, this was added: "Mere failure of the journal to show compliance with the requirements as to the method of enacting the law will not be conclusive that such requirements were not complied with," citing *Commissioners v. Higginbotham*, 17 Kan. 62.

In the recent case of *Conly v. Dilly*, 153 Iowa 677, the contention was that the two houses did not adopt the same bill in that in passing the house it included two amendments omitted by the senate; and among other things, the court observed that "In the first place, it is extremely doubtful if the courts can properly go behind the enrolled bill to scrutinize the details of its legislative history for grounds upon which to hold it invalid. *Clare v. State*, 5 Iowa 508a, 510; *Duncombe v. Prindle*, 12 Iowa 1; 36 Cyc. 971. It may be held that if the record affirmatively disclosed the adoption of an amendment which does not appear in the enrolled bill, or that such bill did not receive a constitutional majority of either house, or other vital defect of that nature, the court would not be bound to accept the enrollment and publication of an alleged statute as a finality; but we are here asked to go very much farther than the suggested case and to presume that the house did adopt certain amendments of which there is not the slightest record, except of the fact that the journal does not show what was done with these amendments, may afford good ground to criticize the manner of keeping the record; but we know of no rule of law or reason by which we can presume they were adopted by the house."

It will be noted that the point under consideration was not involved in any of these cases, but it was covered by what was said in *Duncombe v. Prindle, supra*, and that decision is generally cited in opinions holding that the enrolled bill in the office of the secretary of state when properly attested is con-

clusive evidence of its enactment; and even though what was said in other decisions be *dicta*, these indicate the trend of thought of those concurring therein. Moreover, upon an examination of the conflicting authorities we are inclined to the opinion that this construction has the better reason for its support. There is quite enough uncertainty as to what the law is without saying that no one may be certain that an act of the legislature has become such until the issue has been determined by some court whose decision might not be regarded as conclusive in an action between other parties. Regardless of the good faith of a person or officer relying on the enrolled bill in the office of the secretary of state, this would afford no protection from the consequence of his acts if it should turn out that the journals or other evidence disclosed fatal defects in its passage. One believing that he was complying with the law might be unwittingly committing a crime, or an officer paying out money in supposed obedience to a statute might discover too late that the enactment he undertook to obey had not been adopted in the manner prescribed by the Constitution, according to record of clerks, though the legislators were proceeding under solemn oath of obedience to the fundamental law. It seems quite enough that the average citizen must take notice of the contents of the enrolled bill, when duly authenticated, subsequent to July 4th after passage, without also putting upon him the burden of ascertaining the condition of the journal of the respective houses bearing thereon and determining for himself the effect of any irregularity therein tending to invalidate the bill. Courts could not rely upon the published session laws, but would be required to look beyond these to the journals of the house and senate and often to any printed bills or amendments which might be found after the adjournment of the general assembly. Otherwise, after relying on the prima-facie evidence of the enrolled bills, authenticated as exacted by the Constitution, for years, it might be ascertained from the journals that an act theretofore enforced had never become a law. The inconvenience

of such a rule and the consequent confusion is a strong argument against its adoption.

What is the design of exacting the signing of the enrolled bills by the presiding officers of the two houses and the approval of the governor, and that they be deposited with the secretary of state? Is it not that these are the final records of the acts of the legislature for the information and guidance of other departments of government? If so, why should they not be accorded the respect usually accorded solemn records? If merely steps in the enactment of laws, why are not other matters exacted in the passage of a bill also required to be preserved? The Constitution nowhere requires the bill to be made of record. Aside from entering the yeas and nays on the journal on final passage, no record except the enrolled bill duly authenticated is exacted by the fundamental law; and as the legislature is a co-ordinate branch of the government, in no sense inferior to the other branches and equally bound by oath of obedience to the Constitution, we perceive no reason for not regarding its final record as embodied in such enrolled bill, authenticated as required by Sec. 16 of Article 3 of the Constitution, as absolute a verity as the judgment of a court. Of course, a judgment may be attacked, but not collaterally; and that is the only way an enrolled bill may be assailed.

Each of the three departments of our government is equal and each should be responsible to the people whom it represents. The legislature enacts laws and is commanded by the Constitution to enact them in a certain way. The executive enforces the laws and by the Constitution it is made his duty to take certain steps looking toward such enforcement in the manner prescribed therein upon the happening of certain contingencies. The judicial department is charged with the duty of interpreting the laws, adjudging rights and obligations thereunder. Such being the respective duties of the several departments, it would seem that when certified to have been performed as required by the Constitution, this should

be conclusive on the other departments; and there would seem no more impropriety in the legislature's seeking to go behind the final record of a court to determine whether it had obeyed some provision of the Constitution in making such record than there would be in the court's seeking to go behind the final record made by the legislative department. Where the executive is charged with taking certain things upon contingencies happening and is given no power to act except upon such contingency, if he determines that the contingency exists and acts in pursuance thereof, the courts will not inquire into the fact as to whether he decided correctly in determining the existence of the contingency. Indeed, to preserve the harmony of our form of government, these mandatory provisions must be considered as addressed to the department which is called upon to perform them and neither of the other departments will be permitted in any manner to coerce that department into obedience thereto. Those courts which uphold the inquiry as to whether the legislature has observed the mandatory provisions of the Constitution necessarily assume that it were safer to entrust the enforcement of these to the judicial department than the legislature, and that the judicial department is the only one in which sufficient integrity exists to insure observance of the provisions of the Constitution. Such an attitude seems intolerable. It is sometimes said that the courts assume superiority over the legislature in determining that an act violates a provision of the Constitution. This is not so, however, for they merely undertake to determine whether an act of the general assembly is in conflict with the Constitution and if it is, the statute necessarily must yield, for that the Constitution has a sanction greater than can be given by the action of any department of state.

“Upon principle then, in view of the division into departments under our form of government, each of equal authority, one department cannot rightfully go behind the final record certified to it or to the public from either of the

other departments. And the judicial department is no more justified in going behind the final act of the legislature to see if it has obeyed every mandatory provision of the Constitution than has the legislature to go back of the final record made by the courts to see whether or not they have complied with all the constitutional requirements." *State v. Jones*, 6 Wash. 452; 23 L. R. A. 340.

What was said in *Evans v. Browne*, 30 Ind. 514; 95 Am. D., 710, is especially pertinent: "It is argued that, if the authenticated roll is conclusive upon the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the state in defiance of the inhibition of the Constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers who, being human, may violate the trusts reposed in them. This, perhaps, cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its highest places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments, and correct or prevent abuses of their authority. It cannot authenticate a statute. That power does not belong to it. Nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the Constitution itself. If it may, then for the same reason it may go beyond the journal when that is impeached; and so the validity of the legislation may be made to depend upon the memory of witnesses, and no man can in fact know the law, which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been

enacted by both houses. Human governments must repose confidence in its officers. It may be abused, and there may be no remedy. Nor is there any great force in the argument, which seems to be regarded as of weight by some American courts, that some important provisions of the Constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution or else it assumes that they will wilfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligations."

It is also to be observed that the manner of keeping the journal by either the house or senate is not prescribed in the Constitution. Nor does it require that the acts as finally passed shall be preserved in any form or place other than as enrolled bills, authenticated as exacted therein, deposited with the secretary of state. In *State v. Jones, supra*, the court in reverting to this matter said: "The enrolled acts are prepared with some care, and, under the rules of our legislature and of every legislative body of which we have any knowledge, some committee is charged with the responsibility of seeing that such enrolled bills are compared with the one which actually passed the legislature before they are presented to the presiding officer for signature. There is therefore some protection thrown around these enrolled acts, and it would be a difficult matter for anyone through carelessness or fraud to prevent the will of the legislature, as expressed in the bill actually passed, being embodied in the enrollment thereof. But if the doctrine be once established that the fact that such bill had passed can be negatived by the journal, there would be very little to prevent a bill which had been properly passed, being defeated by the carelessness or fraud of the journal clerk or some employee under him. Under the practice prevailing in the legislature of this state, and in most of the other states, there is very little assurance that the journal will fully and

accurately show the proceedings of the body for which it is kept. The practice in nearly all such bodies is to have the journal read, if read at all, from loose slips of paper, made up partly in writing and partly by pasted slips, and, after being thus read, ordered approved. It is also a fact of which everyone has knowledge that often upon such reading there is such inattention on the part of the members of the legislature that gross errors might pass unnoticed. The journal, as thus read and approved, from loose slips of paper, is then passed to the journal clerk and by him, or under his direction, transcribed into a book, and the slips then carelessly preserved or entirely destroyed. The transcription of these minutes, without any further action on the part of the legislature, or of any person but the one who makes it, except superficial examination by the journal clerk, and possibly by the presiding officer, becomes the formal journal. It follows that the chances of mistake are very great, and for fraud upon the part of the copyist even greater. The Constitution requires that there should be a majority of the body recorded as voting in favor of a bill upon its final passage. Upon such passage, the bill in fact receives one or two more than such constitutional majority, and is duly passed; but if, by carelessness or fraud, the copyist should change one or two of the names of those voting, from the affirmative to the negative, the will of the legislature, regularly expressed, would be defeated; and the same result might follow if in copying he should omit a name. Not only would such results follow in the cases specified, but in many other ways the least error in making up or transcribing the journal might result in the defeat of the will of the legislature. Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist em-

ployed by the legislature at a few dollars a day. Much less evil will grow out of a course of decision which will give the people to understand that the legislative is a department of the government, of as high authority as the judicial, and that with the mandatory provisions directed to it, the other departments of the government have no concern. When this is once well understood, the people will see to it that such mandatory provisions are complied with by the legislature, or, if they do not, the blame must rest upon themselves or the system of government which has as its basis the equal authority of the three departments into which it is divided."

In *Pacific Ry. Co. v. Governor of Missouri*, 23 Mo. 353, 66 Am. Dec. 673, in considering this subject, the court, speaking through Scott, J., said: "If the legislature exceed its powers in the enactment of a law, the courts, being sworn to support the Constitution must judge the law by the standard of the Constitution, and declare its validity. But the question whether a law on its face violates the Constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case, a power is exercised, not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not, in its terms, contrary to the Constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the general assembly in making the law was governed by the rules prescribed for its action by the Constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law. This inquiry may be extended to good as well as to bad laws,—to those passed as well with the approval of the governor as to those which are passed, his objections to the contrary not-

withstanding; for it is clear that if a law passed over the objections of the governor may be impeached by inquiring whether the forms of the Constitution were observed in its enactment, the same inquiry may be instituted in relation to laws passed with his sanction; and thus statutes, constitutional on their face, regular in their terms which may have been the rules of action for years, and under which large amounts of property have been vested, and numerous titles taken, may be abrogated and declared void. A principle with such a consequence should be supported by a weight of authority which no court can resist. When we reflect on the manner in which journals are made up, and the rank of the officers to which that duty is intrusted, how startling must the proposition be that our statute laws depend for their validity on the journals of the two houses of the general assembly, showing that all the forms required by the Constitution to be observed in their enactment have been complied with! The required forms may be observed, and the clerks may fail to make the necessary or correct entry. If the journals had been designed as the evidence in the last resort that the laws were constitutionally passed, would not some method have been adopted by which greater care would have been exacted in entering the proceedings of the two houses? Would the task of making them have been intrusted to a single clerk, with a power in the houses to dispense with their reading, even should there be a rule requiring them to be read, a matter, however, about which the Constitution and laws are silent? In that country from which we borrow so many of our ideas respecting government and laws, and whose common law and early statutes constitute the substratum of all our systems of jurisprudence, the statute roll is the only and the exclusive evidence of what the statute law is so long as it is in existence. There it is maintained that if the journal were every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which, being a high record, must be tried only by itself,—*teste me ipso*.

. . . So it appears that by the common law the statute roll was the absolute and conclusive proof of a statute. This record could not be contradicted. It implied absolute verity. There was no plea by which the existence of a statute could be put in issue. Under this state of the law our Constitution was adopted."

In *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, will be found a review of the authorities up to that time, the court concluding that, "The result of authorities in England and in the other states clearly is, that at common law, whenever a general statute is misrecited or its existence denied, the question is to be tried and determined by the court as a question of law,—that is to say, the court is bound to take notice of it, and inform itself the best way it can; that there is no plea by which its existence can be put in issue and tried as a question of fact; that if the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed, or weakened by the journals of Parliament, or any other less authentic or less satisfactory memorials; and that there has been no departure from the principles of common law in this respect in the United States, except in instances where a departure has been grounded on or taken in pursuance of some express constitutional or statutory provision requiring some relaxation of the rule, in order that full effect might be given to such provisions; and in such instances the rule has been relaxed by judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature. It remains to be seen whether there is anything in our Constitution or laws requiring or authorizing a departure from the common-law rule. . . . When we once depart from principle,—from a sound rule of law,—where shall we stop? Do not the circumstances of this case open to our vision a vista of absurdities into which we shall stumble if we attempt to explore for-

bidden fields for evidence of a vague, shadowy, and unsatisfactory character upon which to overthrow the enrolled statutes of the land? In this case, the enrollment, the record of the statute, exists and we are satisfied that we should not look beyond it, certainly not beyond the record, aided by the journals, and looking at both, we must hold the entire act to be a valid law."

This decision was followed in *County of Yolo v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41, though its author, since a judge of the United States Circuit Court, afterwards seems to have raised some doubt as to its correctness in *County of San Mateo v. Ry.*, 13 Fed. 722.

The question was exhaustively considered in *Pangborn v. Young*, 32 N. J. L. 29, where, among other things, the court said: "For whoever engages in any transaction the validity or construction of which depends upon statutory provisions, whoever holds or acquires any sort of property, or right, the title or enjoyment of which may be affected by the operation of any law, is bound to take notice, at his peril, what the law is. And it is not enough for him to know what the law is after a court of last resort has made an investigation and determined what part of the statute roll is to stand and what part to fall, but he must know in advance of litigation, and govern his conduct accordingly. If there is any record or document outside of the statute roll to which a court will resort for the purpose of testing the validity of an enrolled law, he must not overlook it. If a court will hear oral testimony to impeach the record, he must be able to conjecture in advance what the testimony will be, and what weight will be allowed to it. Considering the exigency of this rule, it is easy to perceive of what extreme importance it is that there should be some high, authentic and unquestionable record to which not only courts and public officers, but private citizens may resort, and by a simple inspection determine for themselves with infallible certainty what are the statutes of the

state, and what are their terms. Considerations such as these had led to the firm establishment in England, at a date anterior to American independence, of the maxims that matters of public law are not the subject of allegation or denial in pleading, nor of proof upon the trial of causes; but that courts would always take judicial notice of the law, and that, upon the suggestion of any doubt as to the existence or provisions of a parliamentary enactment, the court would inform itself in the best way it could, not by listening to proofs, but by inspection of the record, if it was in existence, and if not by looking to the printed statute, or failing that, by examination of other documents where it had been recited, recognized and acted upon. The record which, as long as it existed, was held to import absolute verity, which not only dispensed with, but excluded all other evidence which could neither be aided nor impeached by the journals of parliament, was the copy of the act enrolled by the clerk of the parliament and delivered over into chancery. The question frequently arose in England, but the rule was uniformly maintained that the courts would look to the statute roll, and to that alone."

The issue is also well considered in *State v. Swift*, 10 Nev. 176, 21 Am. R. 721; *Green v. Weller*, 32 Miss. 650; *Carr v. Coke*, 116 N. C. 223, 47 Am. St. 801; *People v. Devlin*, 33 N. Y. 269, 88 Am. D. 377, and many other cases. The authorities bearing on all phases of the inquiry will be found collected in the opinion and note to *Atchison, Topeka & Santa Fe Ry. Co. v. State*, 40 L. R. A. (N. S.) 1.

The Supreme Court of the United States held an enrolled act duly authenticated and on file with the secretary of state conclusive proof of the law as passed by Congress in *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294, where, speaking through Harlan, J., it said: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration of the two houses, through their

presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

“It is admitted that an enrolled Act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is, that it cannot be regarded as a law of the United States if the journal of either House fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the

two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled Act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them."

There the court held it not competent to show from the journals of the house and other evidence that the enrolled bill as passed contained a section not found in the enrolled act in the office of the secretary of state.

Enough has been said and quoted to clearly indicate the grounds of our conclusion that the enrolled bill on file with the secretary of state is the ultimate proof of its passage in the form there appearing and that beyond this, the courts cannot go in ascertaining whether the legislature complied with the requirements of the Constitution. The authorities seem about evenly divided as to whether resort may be had to the journals of the houses, but there is a decided tendency in recent decisions to hold that the enrolled bill is conclusive evidence of its passage as it appears. In the last edition of Sutherland on Statutory Construction at page 72 the author observes that "It is no longer true that 'in a large majority of the states' the courts have held that the enrolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act. Undoubtedly, the decision of the

Supreme Court of the United States in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495, has had much to do in creating and augmenting this current, but it may also be due to the greater simplicity, certainty, and reasonableness of the doctrine which holds the enrolled act to be conclusive. Many courts and judges, while feeling compelled to follow former decisions holding that the enrolled act may be impeached by the journals, have done so reluctantly, and have expressed doubts as to the validity of the doctrine, and in many cases, as will appear in the following sections, have qualified and restricted it in important particulars."

Dissatisfaction with the contrary rule has been expressed in the following cases: *Webster v. Little Rock*, 44 Ark. 536; *People v. Starnes*, 35 Ill. 121, 85 Am. D. 348; *State v. Andrews*, 64 Kans. 474, 67 Pac. 870; *State v. Moore*, 37 Neb. 13, 55 N. W. 299.

In *State v. Chester*, 39 S. C. 307, 17 S. E. 752, previous decisions were overruled. The entire field on both sides has been covered in the decisions of other states and we have sought only to indicate the reasons which have been persuasive to us in reaching the conclusion that the enrolled bill duly authenticated as exacted by the provisions of the constitution is conclusive, not only that it passed the general assembly but that it so did in the form of the enrolled bill. In other words, the several sections of the Constitution are mandatory and when an act has been promulgated as therein prescribed, only then does it become a law of the state. This does not relieve either house of the obligation under Sec. 17 of Article 3 of the Constitution of seeing to it that the yeas and nays on the final passage of every bill are entered on its journal. This is to be actually complied with and only when so done and it appears that a "majority of all members elected to each branch of the general assembly" have assented thereto is the bill to be "signed by the speaker and president of their respective houses." Sec. 15 of Article 3. Thereby the

presiding officer of each house certifies to the passage of the bill in conformity with the requirement of the Constitution and the rules of the respective houses and such certification may not be impeached by the very fallible record of some clerk ordinarily made up from hastily prepared memoranda and for the preservation of which the law makes no provision, or other evidence of like character. The respective houses having certified to the passage of a particular bill in the manner prescribed by the fundamental law, it is not competent for the courts to inquire whether the general assembly—a co-ordinate branch of government—has observed the requirements of the Constitution devolving upon it and inquire whether its certification is true. Such a course would be inconsistent with the independent character of the legislative department, which necessarily must pass on the manner of performing its duties; though, as previously observed, the extent of its powers as defined by the Constitution is appropriate matter for judicial inquiry. A bill may be presented to the governor for approval only after it has passed both houses, and the only authentication of the bill in form or substance as being that which has been passed is the signature of each presiding officer, and only when so signed and approved or approval omitted for three days is it deemed a verity, and the courts will not get behind the enrolled bill to ascertain whether the legislature complied with the requirements of the Constitution in its adoption. In other words, the certification through the presiding officers by the General Assembly is deemed conclusive evidence that the bill was passed as exacted by the Constitution. What has been said, perhaps, indicates with sufficient definiteness our conclusion that the signature of the speaker was essential to the validity of the enrolled bill. Courts holding that resort may not be had to other than the enrolled bills to ascertain their enactment by the General Assembly are unanimous in deciding that the signature of the presiding officer of each house is essential as proof of their passage and that the omission of either is fatal to the bill.

26 Am. & Eng. Enc. of Law (2nd Ed.) 545. Moreover, the greater number of those deciding that the journals of the respective houses or other evidence may be resorted to for the purpose of ascertaining whether constitutional requirements have been observed as to the manner of passing a bill, entertain the same view and declare the omission of the signature of either presiding officer from the enrolled bill fatal. *State v. Platt*, 2 S. C. 150, 16 Am. R. 647; *Moody v. State*, 48 Ala. 115, 17 Am. R. 28; See 26 Am. & Eng. Enc. of Law (2nd Ed.) 545; *Lynch v. Hutchinson*, 219 Ill. 193; 4 A. & E. Ann. Cases 904; *State v. Howell*, 26 Nev. 93; *Scarborough v. Robinson*, 81 N. C. 409; *Jones v. Hutchinson*, 43 Ala. 721; *Legg v. Annapolis*, 42 Md. 203; *State v. Kieseewetter*, 45 Ohio St. 254, 263, 12 N. E. 807. Manifestly, this is because of the very tenable theory that all provisions of the Constitution, unless the contrary appears therefrom, are to be regarded as mandatory. It is hard to understand arguments construing any portion of the fundamental law as discretionary; for, if so, there could be no adequate reason for including it therein. As observed by Judge Cooley in his work on Constitutional Limitations, p. 94: "The courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the things to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a Constitution provisions which the

people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or mode of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end; especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leaving as little as possible to implication."

This is expressive of the view entertained by the great weight of authority and there appears no sound reason for not holding, in accordance therewith, that, in order that a bill may become a valid law of this state, compliance with the section of the Constitution under consideration (Sec. 15 of Article 3), exacting the signature of the speaker of the house as well as that of the president of the senate, is essential to the authentication of the bill in form and substance as well as essential to certifying its passage. All are presumed to know the law and it is of highest importance to each citizen as well as to the public officer that there be an authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature which control him and which he is bound to observe at his peril. Whatever conduces to certainty in this respect is of great moment to every person in the state and no rule of construction would be wise which would leave so important a matter to doubt or uncertainty. Our conclusion that the enrolled bill must be

signed by both the speaker of the house and the president of the senate, and that when so signed and approved by the governor, or approval omitted under circumstances defined in Sec. 16 of Article 3 of the Constitution, it is conclusive that it has been properly enacted and has become a valid statute of the state, accomplishes this, and we need only add that, in consequence thereof, chapter 214 of the 33rd general assembly, not having been signed by the speaker, is not and never was a part of the laws of this state.—*Affirmed*.

DEEMER, C. J., EVANS, GAYNOR, PRESTON and SALINGER, JJ., concur.

WEAVER, J., takes no part.

STATE OF IOWA, Appellee, v. C. L. NICOLA, Appellant.

HOMICIDE: Self-Defense—Threats—Bearing on Defendant's Reason-

- 1 **able Belief.** Threats of deceased to kill defendant's mother may be considered by the jury in determining the question whether defendant had reasonable grounds to believe that his mother was in imminent danger of death or great bodily injury from the deceased. Defendant is entitled to a specific instruction to this effect if requested.

PRINCIPLE APPLIED: There was evidence that the deceased at the time of the fatal encounter repeatedly threatened to kill the mother; stated he would do it now, reached into his pocket and started towards her; that the mother called to the son that the deceased was going to kill her. Defendant immediately thereafter shot deceased. The court instructed that if the jury found such threats were made and that the defendant as a reasonably careful and prudent man believed in good faith that the deceased was going to carry out said threats, then the defendant was justified in arming himself for the purpose of protecting his mother. *Held*, not to sufficiently protect the defendant on the effect of threats.

HOMICIDE: Self-Defense—Reputation of Deceased—Relative

- 2 **Strength—Right to Instruction.** Defendant is entitled to a specific instruction if requested that (a) threats made by the deceased against the one assaulted, (b) reputation of the deceased as a violent and dangerous man, (c) defendant's knowledge of such reputation, and (d) the relative strength of deceased and the one assaulted, are all relevant matters to be considered by the jury on the question of defendant's state of mind when he killed deceased.

HOMICIDE: Self-Defense—Right to Continue.

- 3 If the facts and circumstances are such as to justify in law the employment of self-defense, then such self-defense may be continued until it reasonably appears to defendant that the defendant or the one assaulted is out of danger.

PRINCIPLE APPLIED: In instant case defendant fired two shots. The State claimed the last shot was unnecessary. There was evidence that the first shot might not of itself have caused immediate death, and that deceased did not cease his assault until after the two shots were fired. *Held*, under the above limitation, defendant was entitled to an instruction that he had a right to continue to shoot until it reasonably appeared to him that his mother was out of danger from deceased.

HOMICIDE: Self-Defense—Warning to Deceased—Necessity for.

- 4 A "warning" to deceased to desist from his assault is not, as a matter of law, a condition precedent to the right to employ self-defense. If a warning might be necessary, it is only in event that it appears to the defendant, as a reasonably prudent and cautious person, that such warning would have been all that was necessary to avoid death or great bodily harm to defendant or to the one defended.

CRIMINAL LAW: Defendant's Failure to Testify—Reference to.

- 5 A direct reference in the course of a trial to defendant's failure to testify is fatal, under Sec. 5484, Code, to the validity of the trial.

PRINCIPLE APPLIED: Counsel for State during the argument said: "There is another thing in this case that the defendant has not denied and that is the writing of the letter to his brother on the day on which he killed his father." The record made by the court in the presence of the jury showed that the court understood that counsel was referring to the fact that the defendant had not testified. The court directed counsel not to make such reference and the jury not to consider any such reference. *Held*, new trial must be granted.

Appeal from Mahaska District Court.—HON. JOHN F.
TALBOTT, Judge.

WEDNESDAY, FEBRUARY 17, 1915.

DEFENDANT was indicted for the crime of murder in the first degree, and upon trial to a jury was convicted of manslaughter; and appeals.—*Reversed and Remanded.*

Frank T. Nash and McCoy & McCoy, for appellant.

George W. Cosson, Attorney General, *Wiley S. Rankin*, Special Counsel, and *James A. Devitt*, for appellee.

DEEMER, C. J.—It is practically conceded that the verdict has support in the testimony, and the errors relied upon for a reversal relate to the instructions given and refused, and to alleged misconduct of counsel for the State.

Deceased was defendant's father, and the homicide grew out of an altercation at the father's home, and defendant contends that the shooting was due to an assault made by deceased upon his mother and was in defense of her person. Deceased was a conductor in the employ of the Minneapolis & St. Louis Railway Co., and was at home on the day of the affray resting up and getting ready for his next run, the train he was to take leaving Oskaloosa about six o'clock in the evening of the day he was killed. He did not get along well with his wife, and they often quarreled with each other. Just prior to the homicide, which occurred some time during the middle of the afternoon, deceased had been resting in his bedroom on the second floor of the house, and he came downstairs with his wife. He was angry when he came down, and shortly after getting to the lower story he threatened to kill his wife, and declared he would shoot her "right away." Deceased then took a chair and attempted to lace his shoes.

In the meantime defendant, without the knowledge of either parent, came down from the upper story of the house.

When deceased was found by the coroner his body was lying to the south of the bathroom door, in an angling position, with his head toward the door. His right hand or thumb was tucked into his pocket, and a closed razor was about half way out of the pocket. There was fresh blood on the wall of the room near the bathroom door, and about thirty inches above the floor. Defendant immediately surrendered himself to the police, saying that he had shot his father, guessed he had killed him, and that he did so "to protect his mother."

Enough has now been stated for an understanding of the points relied upon for a reversal of the judgment.

I. Defendant asked the following instructions:

1. **HOMICIDE:**
self-defense:
threats: bearing on defendant's reasonable belief.

"42. If you believed from the evidence that deceased, William Nicola, made any threats against the life of Bertha Nicola, you may take into consideration such threats in determining whether defendant was justified in acting upon appearances when he killed the deceased.

"43. If you find from the evidence that William Nicola, the deceased, prior to the tragedy made any threats against his wife, Bertha Nicola, then such threat or threats, if any, should be considered by you as explaining the conduct or apprehension of said defendant, if any, at the time of such killing.

"45. You are instructed that you may consider, in determining as to whether the defendant had reasonable grounds for believing that his mother, Bertha Nicola, was in an imminent danger of death or great personal injury from the deceased, prior to the shooting had made threats to the said Bertha Nicola that he would kill or injure her."

The only instruction given by the trial court referring to these threats, was as follows:

"28. You are instructed that if you find from the evidence that the deceased, William Nicola, had threatened to

take the life of Bertha Nicola, and if he had made said threats, if any, in the presence of the defendant, or if you find that said threats had been reported to the defendant, and that the said defendant, as a reasonably careful and prudent man, believed in good faith that the deceased was going to carry out said threats, then the defendant was justified in arming himself for the purpose of defending and protecting said Bertha Nicola in the event the said William Nicola should endeavor to carry out said threats. But in considering this matter you should take into consideration the apparent necessity for such action on the part of the defendant and if you find from the evidence beyond a reasonable doubt that he armed himself for the purpose of engaging in a conflict with William Nicola, and for the purpose of killing him, and not for the honest purpose of self-defense, or the defense of Bertha Nicola, then he was not justified in so arming himself, and such act will under such circumstances be competent evidence of malice and intent."

We do not think the instruction given met the propositions involved in the requests; and it is practically conceded that the latter announced correct propositions of law. If not conceded, it is well settled that they are correct expositions of the law of self-defense. *State v. Beird*, 118 Iowa 474, 478; *People v. Zigouras*, 57 N. E. (N. Y.) 465; *State v. Petsch*, 20 S. E. (S. Car.) 993.

II. Defendant also asked the court to instruct as follows:

"27. You are to determine from the evidence the state of mind of the defendant when he shot and killed the deceased, if he did so, and in that connection you may consider

<p>2. HOMICIDE: self-defense: reputation of deceased, rela- tive strength: right to in- struction.</p>	<p>threats, if any, made by the deceased against his wife, the reputation of the deceased, if such it is, was as a violent and dangerous man, the defendant's personal knowledge if such he had that the deceased was a violent and dangerous man, the relative strength of deceased and defend-</p>
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ant, and all other facts in the case that may shed any light upon such state of mind."

Nothing of like import was given, and the refusal to give the instruction was error. *Clark v. State*, 76 S. W. 573, 574.

3. HOMICIDE:
self-defense:
right to con-
tinue.

III. The firing of the two shots was one of the essential features of the case, and as bearing thereon the defendant asked the following instruction:

"44. If you believe that at the time of the attack, if any, of the deceased upon his wife, which reasonably appeared to the defendant, that the purpose was either to kill or do her serious bodily injury then, if you so believe, defendant would have the lawful right to defend her from such attack; and, if defendant commenced to shoot under such circumstances, you are instructed that he would have the right to continue shooting at deceased, until it reasonably appeared to him, from his standpoint, that she was out of danger from such unlawful attack."

Nothing of this character was given. The instruction was correct and should have been given as requested. *Kelly v. State*, 62 S. W. (Tex.) 915.

Much was made by the State, of course, of the firing of the second shot, and an instruction upon the subject was quite essential in order that the jury might be advised as to the bearing of this evidence upon defendant's right of self-defense. Defendant contended and introduced evidence to show that the first shot was not likely to result in immediate death, and testimony was offered tending to show that deceased did not cease his assault until after the second shot was fired. It was for the jury to settle any dispute in the testimony with respect to this and to apply the law to the facts as found.

IV. Instruction No. 30, given by the trial court, reads as follows:

"You are instructed that Bertha Nicola, being in her own home, where she had a right to be, need not retreat, and the defendant would have the same right to defend her that she would have to defend herself. And if William Nicola so acted, under such circumstances as to induce in the defendant a reasonable and honest belief that his mother was in danger of losing her life or receiving a great bodily harm from the immediate acts of the father, he would have a right, under the law, to prevent the threatened injury even to the taking of the life of said William Nicola, but you are instructed that he would have no right to take the life of said William Nicola, without first warning him to desist from his attack unless you find from the evidence that defendant was justified in believing that he had not time to give such warning."

The qualification of this instruction regarding warning to the deceased is complained of, and we think the complaint is well founded. It was not necessary as a matter of law for defendant to have warned the deceased before firing the fatal shot; and if a warning might be necessary, it was only in the event that it appeared to the defendant, as a reasonably prudent and cautious person, that such warning would have been all that was necessary to save the mother from harm. Such a warning as is referred to in the instruction necessarily had reference to whether or not defendant might have saved his mother by some other means than taking the life of her assailant.

A warning before shooting was not required, as a matter of law; and under no circumstances, save as it reasonably appeared to defendant that by so doing he might have avoided the necessity of taking life. The qualification was likely to confuse the jury, and it was really inconsistent with what preceded. From any standpoint it was, as we think,

erroneous. See, as supporting this view, *People v. McCard*, 40 N. W. (Mich.) 784.

5. CRIMINAL
LAW: defend-
ant's failure
to testify:
reference to. V. During the argument of the case, one
of counsel for the State used the following
language:

"There is another thing in this case that the defendant has not denied and that is the writing of the letter to his brother on the day on which he killed his father."

The defendant's counsel objected, as shown, and the court made the following record thereon:

"Counsel for the defendant except to the statement just made by counsel for the State in regard to the defendant not denying as prejudicial.

Court: "The county attorney is advised not to make any reference to the failure to testify on the part of the defendant and any remark of counsel in regard to that should not be considered by the jury; and you, gentlemen, are advised not to consider anything said in respect to the failure of the defendant to testify.

Mr. McCutcheon: "What I meant, gentlemen, is that the attorneys for the defendant have not denied the writing of this letter to Des Moines. Objections and exceptions to court's instructions."

Code Sec. 5484 reads as follows: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial."

The reference made by counsel in argument was specifically to the defendant as not having denied a matter of testimony; and the trial court was of opinion that counsel was referring to defendant's failure to take the witness stand on his own behalf. If the court so understood it, certainly the jury must have had the same impression. Surely after hearing the remarks of the court no doubt remained in its mind. So long as the statute remains in force it must be respected by the courts, even though they regard it as of doubtful propriety. *State v. Baldoser*, 88 Iowa 55; *State v. Hector*, 158 Iowa 664, and cases cited.

In the cases relied upon by the State, there was no direct reference, as here, to defendant's failure to deny. *Vide. State v. Seely*, 92 Iowa 488, 490; *State v. Snider*, 119 Iowa 15; *State v. Hasty*, 121 Iowa 507; *State v. Baker*, 143 Iowa 224; *State v. Krampe*, 161 Iowa 48; *State v. Davis*, 110 Iowa 746.

In addition to the two cases already cited in support of this opinion, the following sustain the holding that the remarks in the instant case were within the inhibition of the statute. *State v. Graham*, 62 Iowa 108; *State v. Ryan*, 70 Iowa 154.

In no case have we held that a direct reference to defendant's failure to testify upon the witness stand is not within the prohibition of the statute. A new trial should have been granted on this ground alone.

VI. Other matters are argued, but they are either without merit or will not arise upon a retrial. But for the errors pointed out, the judgment must be reversed and the cause remanded for another trial.—*Reversed and Remanded.*

LADD, GAYNOR and SALINGER, JJ., concur.

BLANCHE TIPTON, Appellant, v. RALPH TIPTON, Appellee.

DIVORCE: Husband and Wife—Living Apart by Agreement—Sever-

1 **ance of Relation—Desertion.** Where a husband and wife never lived together in the same house, each, by mutual agreement, living separately in the homes of their respective parents, such arrangement created a marital relation capable of being severed by desertion. Whether one party has severed such relation depends upon the peculiar facts of each case. In the instant case, *held*, the evidence showed such severance.

DIVORCE: Marital Relation—Severance—Intent—Desertion—Statu-

2 **tory Period.** The mere severance of the marital relation is not sufficient. The severance must be intentional—wilful—an abnegation of all duties of the marriage relation with intent not to return—for the statutory period.

DIVORCE: Wilful Desertion—Reasonable Cause as Element. Wilful

3 **—intentional—desertion** is not of itself sufficient to justify a divorce decree. It must be without reasonable excuse. Evidence reviewed and held to show desertion in instant case was without reasonable excuse.

DIVORCE: Desertion—Reconciliation Refused—When Justified. A

4 **wife suing for divorce** is not precluded from relying on desertion, though she has no affection for her husband and dislikes him and refuses reconciliation, when her state of feeling toward her husband is the result of his own evil conduct. Evidence reviewed and held to show that defendant's own conduct justified plaintiff in refusing to live with him.

DIVORCE: Reconciliation—Offer After Accrual of Cause for Di-

5 **vorce—Effect.** An offer of reconciliation by a guilty spouse after the expiration of two full years of desertion without cause does not obliterate his offense and so deprive the innocent spouse of the right to a divorce.

DIVORCE: Right to Divorce Established—Eleventh-Hour Promise

6 **to Reform.** When one party to the marriage has fully shown a right to a divorce, and demands it, the court has no power to deny such divorce simply because the other party on the trial promises to return to the marital relation.

Appeal from Warren District Court.—HON. W. H. FAHEY,
Judge.

WEDNESDAY, FEBRUARY 17, 1915.

BOTH parties assert they are entitled to a decree divorcing them, each charging the other with wilful desertion. The trial court denied all relief to both. The plaintiff, the wife, alone appeals.—*Reversed and Remanded.*

Berry & Watson, for appellant.

O. C. Brown, for appellee.

SALINGER, J.—I. Though defendant responds to the allegation of plaintiff that the parties lived together until October, 1910, by answering that plaintiff never did live with him, and though we concede they did not “live together,” as husband and wife ordinarily do, we have no occasion to give these contentions and the departure of the parties from the standard marital relation any exhaustive consideration. Whatsoever they did or failed to do before October was on mutual arrangement, and for mutual convenience, and will afford neither a ground for invoking judicial action against the other. Indeed, none is invoked. Both declare that no fault is found with what occurred before October, 1910, and the desertion charged is based wholly on what occurred after that time. Where the mutual conduct and the relationship maintained contents both parties, the courts are not called upon to standardize conjugal conduct and relationship, and will not divorce parties because they have departed more or less from such standard. But while that which was done upon consent prior to desertion cannot be a basis for granting a divorce, for reasons stated later, we must consider it. At this time we consider it, first, on whether there was a marital rela-

1. Divorce:
husband and
wife: living
apart by
agreement:
severance of
relation:
desertion.

tion to sever—and we hold that there was. Second, we must consider it to determine whether the conduct of defendant after October so differed from what it was before as that the difference proves he has severed the marital relation. Ordinarily, it is easy to determine whether there has been a separation. Though separation and desertion are not synonyms, though it is neither true nor essential that the two occur the same instant, though there may be separation without desertion, and though there may be desertion without physical separation by removal to a different domicile,—see *Kupka v. Kupka*, 132 Iowa 191,—it remains true that, ordinarily, this element in the proof is made out by showing that the alleged guilty party has removed from the place in which theretofore the parties lived together in the usual way. Whether this defendant severed the relationship cannot be so determined, because the parties did not live together in the usual way. The wife was immediately after the marriage taken to the home of her parents. From then until October 10, 1910, her father supported her. In strictness, defendant never made his home where he had placed the plaintiff, and up to October the marital relation was maintained by visits of defendant at the home of her parents several times a week, and by occasional short period visits of the wife at the home of his parents. If, then, the defendant severed the marital relationship, it must be by conduct so differing from what it had been before October 10, 1910, as that therefrom a separation from his wife appears as clearly as though the two had been constantly living in their own house, and defendant had removed himself therefrom.

It is not and cannot well be denied that the conduct of the defendant subsequent to October 10, 1910, does differ from what it had been before. While prior to October, 1910, there was a failure to support a wife not in ill health, thereafter there was a failure to support a sick wife and a baby which was born in 1911. While prior to October, 1910, the parties were on friendly terms and at times at the homes of their

respective parents, thereafter, and up to the time of the trial, the defendant had no communication whatever with plaintiff and attempted none. Though advised of her serious illness, and of that of his baby, and though sent for by the wife, he made no response in person or otherwise. He never saw the child, nor attempted to see it, until the day of the trial. It does not appear that he caused it to be brought to the trial, or knew that it would be there; nor that he displayed any sign of natural affection when he did see it. This is emphasized because defendant swears on the trial that he was then willing and able to care properly for both wife and child without a claim that he was not as able earlier.

We hold: (1) Though the manner of living together is a departure from the usual in marital life, if the parties are content therewith, it creates a relation which may be severed in the sense of divorce law. (2) There can be no hard and fast rule as to what constitutes such severance, and whether one party has severed the relation must ordinarily depend upon the facts of each case. (3) The evidence shows the defendant did sever the relationship.

- II. But mere severance of the relation is not sufficient. There must be a wrongful intent to desert, continued for the statutory period. This, however, means merely that desertion must be intentional.
2. DIVORCE:
marital relation: severance: intent: desertion: statutory period.

"The act is wilful when there is a design to forsake the other spouse wilfully, or without cause, and thereby break up the marital union; deliberate intent to cease living with the other as spouse; abnegation of all duties of the marriage relation, not to return.

"Desertion consists in the actual ceasing of cohabitation and the intent in the mind of the offending party to desert the other." *Kupka v. Kupka*, 132 Iowa 191, at 193, and cases cited.

We think that what we have set out as being proof that defendant severed the relation between plaintiff and himself, and evidence which we discuss later on other branches of our inquiry, establish the second element—that the desertion was intentional, and that the intent continued for the statutory period.

III. While thus two necessary elements have been established, this will not suffice. The act of separation, and the continued intent to remain separate, must be wrongful in the sense that there is no reasonable excuse for the one who separated with such intent. The real conflict in this case is on this head. In substance, the real defense attempted is that plaintiff was and defendant was not in fault.

3. DIVORCE:
willful deser-
tion: reason-
able cause as
element.

What shall herein be said on this head should not be misunderstood. To determine whether defendant entertained a wrongful, because inexcusable, intent to desert, an analysis of and pronouncement upon alleged misconduct of each party, and of excuses offered for conduct, is necessary. But we are not attempting to decide whether the misconduct discussed is or may be a ground for divorce. Here, plaintiff is not entitled to a decree except upon proof that she has suffered a statutory desertion. To determine that ultimate question, conduct which of itself is no ground for divorce and evidence addressed to a ground for divorce other than desertion may or may not be relevant. Nonsupport is no ground for divorce; blows inflicted might warrant a decree on the ground of cruel and inhuman treatment, or might fall short of doing so—but the nonsupport or the blows might or might not be relevant on the ultimate question of whether there has been an unjustifiable desertion within the meaning of our statute. These and kindred lines of testimony may or may not have probative value on this ultimate question. *Kupka's case*, 132 Iowa [191] at 195; *Smith v. Smith*, (N. J.) 37 Atl. 49, 52.

Our discussion of alleged misconduct and as to whether, if it exists at all, it was without excuse, is merely a method

for determining whether or not there has been a statutory desertion; and what is said in the course of it decides nothing except the bearing such misconduct, and the like, has upon whether defendant has unjustifiably deserted—an ultimate question which involves whether he separated himself from his wife with a wrongful intent to desert.

1.

The misconduct of plaintiff, which is urged as a warrant for denying her relief, is presented by the answer as follows:

A. Defendant urged her to live with his parents. She refused to do this, and has persisted in living with her parents; and she has not lived with him.

B. About October 10, 1910, he arranged to commence housekeeping with plaintiff; that he arranged for a house and ground, and bought certain provisions; that he urged his wife to come to him in fulfillment of her obligations as a wife in order that a home for both might be made—and that she wholly refused to comply, and persisted in remaining at the home of her parents.

If there was a request that the wife change to living with his parents, it must have been one made before October, 1910. For defendant pleads and attempts to show that the request which he made about and after October 10th was not one to live with his parents, but to live with him in a house which was not the home of his parents. We are fully persuaded the record does not sustain a claim that there was either request or refusal to change the mode of life pursued by plaintiff up to October. While defendant does testify broadly that his wife deserted him and would not come to make her home with his people, and that he could have "taken her home" if she had wanted to go, there is no evidence that his parents were ever willing to let the couple make their home with them; and defendant says, in terms, that he took her to the home of her parents because he had no home for her. Plaintiff's statement that he never asked her to live with his folks, and that she remained with her own because he wanted her to do

so, is fully sustained by the record. All the attendant circumstances and the great weight of all the testimony establish the fact that her remaining at her father's home before October 10th was an arrangement natural under all the conditions existing, and one entered into and maintained by mutual consent, for mutual convenience. At the time of the marriage the mother of the plaintiff was in such helpless physical condition as to supply one natural reason for a consent that the daughter might, for a time at least, remain with her. Defendant himself testifies that his wife wanted to remain with her father because the father had a broken leg; that she desired to stay with him until the leg was well, and that it was in accordance with this request that he went to his folks. While, because he has not appealed, his dismissed cross-petition is not, in strictness, to be treated as a pleading in the case, it is still in the record in the sense that its admissions are competent against the one who filed it—and it is therein pleaded that the daughter desired to remain with the father until he recovered; that at the same time she requested the defendant to remain with his parents until some arrangement could be made for their living together, and that he complied with her request. It appears by a clear preponderance that early in July he arranged for her staying until her confinement, which was thought to be due January following, was passed. So far from complaining of her living at the home of her father, he seeks to excuse himself for not visiting her there more frequently on the ground that his work made it practically impossible for him to be with her more; and he asserts that she acquiesced in this and made no objection to his thus attending to his business.

It is very clear that plaintiff was guilty of no misconduct in remaining at the home of her father up to October 10, 1910.

2.

The next contention is that refusing to go to house-keeping, on request made about October 10, 1910, is misconduct.

Unless we reabstract the record in this opinion, it is impossible to do more on this head than to point out the ultimate deductions which we find should be drawn from the evidence. It so appears that about October, 1910, the husband and wife came to an understanding that some time in the next spring they would remove to South Dakota, and so far from then feeling unwilling to live with her husband, she made preparations for that venture. Somehow, defendant concluded it would be an aid to the Dakota project to begin a temporary housekeeping between the middle or end of October and the coming spring, and he requested her to co-operate. By way of arranging for this, he obtained the consent of his family that the couple might live in a house then vacant, on a farm then leased by his folks. He says he thinks the house was all right because a family had lived in it the year before; it looked nice; that he does not know how many rooms it had; that it had a roof, but he couldn't say whether it was good or not. By way of further arrangement he bought two barrels of apples, quite a quantity of tomatoes and cans to can them in, and he also provided for all the potatoes they would want to eat, and for fuel. He provided no furniture, but his mother says that he told plaintiff she could get anything she wanted, and that "he would pay for it and set up housekeeping." There is nothing to show he had credit, and his own testimony, perhaps colored by the fact that alimony was in issue, indicates he had no means. This sums up the preparations for this housekeeping; and it corroborates the claim of plaintiff that defendant never offered to furnish her a home, any place. The plaintiff responded to this request by letter. Considering her evident inability to express herself aptly in writing, the letter shows an affectionate interest in him. As to the request, she writes: "Ralph, I just can't come down," which is preceded by a statement that she does not feel a bit well. She adds: "Oh, Ralph, don't think about keeping house until spring. I will either be better or be a thing of the past." She writes she hasn't done much that

week, and that her mother may not go to Dakota with her father as the latter desires, because she (plaintiff) guesses her mother is afraid to leave her. This letter is relied on as the main evidence of a refusal which constitutes misconduct. We do not so view it, and think that such refusal as the letter amounts to is not unjustified, and is not misconduct. It should be borne in mind that in July preceding, defendant had arranged with plaintiff's father that she should remain at the father's home until her confinement was passed, and that this proposed arrangement to go to housekeeping not only overturned that arrangement, but contemplated, as a temporary aid for removal to Dakota, that the wife, then within two or three months of her confinement, should in the winter season go to housekeeping in a "home" thus, and thus only, provided. Moreover, the Dakota project was not only abandoned by the defendant, but he claims he informed his wife of that fact early in the year 1911; so that had she gone to this place, if there was one to go to, the reason given for moving there at all would have ceased to be a reason shortly after she had made the change.

This failure to join in the proposed housekeeping was in the circumstances not unreasonable, and did not justify the conduct of defendant thereafter. *Kupka's* case, 132 Iowa at 193-194; *Smith's* case, *supra*.

3.

In this connection it becomes necessary to consider a claim that the action is, in any event, prematurely brought, because the letter written by the plaintiff in some way created a time limit which did not expire until the spring of 1911, and that no desertion could begin until then. This proceeds on the theory that the letter was a refusal to live with plaintiff until the spring of 1911 arrived, that this was acceded to, and that plaintiff may not agree to be separated during a fixed period and make separation for that period the basis of claiming a desertion. In our opinion, this contention is not tenable.

In the first place, the letter made no request for such an arrangement and it obtained none such. An affectionate request to defer housekeeping until spring, made by one who on consent was to live with her parents until her confinement was over, was not yet confined, and was sick when she asked such postponement of housekeeping, is neither a refusal to live with her husband until spring nor a consent that there shall be a separation until spring. At most, it is a request that the arrangement made for her living at her father's be not changed till spring. In essence, it was a plea that no housekeeping be started then because she was too ill, and a request for mere indulgence in beginning housekeeping, which housekeeping was an illogical, quickly abandoned and inopportune makeshift pending a removal to another state.

Next, as defendant made no response, and there was, therefore, no agreement reached, it cannot well be claimed that between October and the spring following he acted under the belief that for that period he was living apart under agreement to resume cohabitation at the end of the period, and that, therefore, there could be no intent to desert until that period had ended. Of course, if he entertained such belief erroneously, but in good faith, his mere absence up to the spring of 1911 would not prove such intent. But we feel that he did not so believe. Clearly, the letter itself gives no ground for it. He soon abandoned the plan of going to Dakota, and any claimed agreement covers only such absence on his part as was made necessary to carry out his ideas of preparing for the removal to Dakota. If he believed that they would live together and go away together in the spring, how can it be accounted for that between the receipt of the letter and the end of the period covered by such claimed agreement he ceased visiting her and had no communication with her? During that period he failed to visit her in confinement, and her child in its sickness, though sent for. In his answer he declares that he has neither knowledge nor means of information as to how mother and child obtained support. Was this the conduct

of one who had no intent to abandon the relations and duties of a husband and who believed that while there was an agreement to delay housekeeping for a fixed time, he and his wife would soon assume full conjugal relationship? We are constrained to believe that the period between October, 1910, and the spring of 1911 is not to be subtracted from the time in which an intent to desert was entertained; that the intent to desert present after the spring of 1911 was in existence before—and hold that the suit was not premature.

IV. From October 10, 1910, to the time of the trial, defendant, as said, had no communication with plaintiff, and attempted none. Though advised of the wife's serious illness, that a child had been born and, later, that the child was sick unto death, and though sent for by the wife, he responded in no manner. So far as appears, he made no inquiry as to the condition of the mother or as to the birth of the child, and made none after the child was born. He declares in his answer his supreme indifference by stating that he has neither knowledge nor information sufficient to form a belief as to how the wife and child had been kept alive during some two years. He never saw the child until he saw it on the trial. It does not appear that he caused it to be brought there, or knew that it would be there, nor that he displayed any sign of natural affection when he did see it. Yet he insisted on the hearing that he had affection for the child, and we are asked to believe him when he then said that he was then willing and able to care properly for both wife and child. He makes no explanation why he was not able to do this earlier, and why he made no attempt to do it.

The record presents the following excuses for defendant's failure to visit or hold communication with his wife, and for his treatment of his wife and child. He says he was not notified when the child was born; that at the time it was born he was working away from home at some place, he does not "just remember." This, however, is coupled with the statement that he heard of the birth within three or four days, but

did not go to see about it; that he "never went near." Another statement is, that he can hardly say why he made no effort to see the baby, and did not see it until the trial, and that, for another thing, "he didn't just exactly like to make the neighbors gossip out of it more than anything else. That is the only reason I can say. By neighbors' gossip I mean that when we wasn't living together it looked kind of bad, you know, for a person to go out to meeting any place like that, and I kind of hated to not being around the child myself and the way I never did, I never was a great hand over children."

Finally, he gives his conclusion that he "wasn't wanted over there"; that at first her father made him feel pretty welcome, but after a while he acted as if he did not care whether he came or not; that he got so he only spoke to him on the street when they met; that he took the hint from this that he wasn't wanted up here and, therefore, he didn't care to go there. He both limits and amplifies this by a statement that his wife wrote him in a letter, which he believes he can but does not produce, that her father was mad at him and that he so had orders to stay away—that this was one of the main reasons for his not going. While his claim that the testimony as to this letter is not denied by plaintiff is technically true, it does not follow that the existence of the letter is established, or that the excuses of defendant are valid. His theory on this head is not undisputed. It is met by the circumstances, by the testimony of plaintiff's father that he knows of no reason why defendant did not come; that they had no trouble whatever; that he was particular not to let him know his visits were distasteful or to let it be known that he did not care for him to remain there, and that he talked to him in a friendly way. Defendant's contention is also met by the fact that when his mother went to see the sick baby, she was treated nicely, and that she informed defendant of it.

V. Defendant urges that the plaintiff is wanting in natural affection for him. That she did not desire reconcilia-

tion—in effect, that she should have no relief because the separation between the parties was really by her consent. It is undoubted that where one who charges desertion complains of a justified departure, and it appears that if it were not for the contumacy of the plaintiff a return could be brought about, such a showing of want of proper affection on part of the complaining party will authorize a court of equity to deny relief on the ground that such absence is, in effect, assented to by him. *Wright v. Wright*, 80 Mich. 572, 45 N. W. 365; *Smith v. Smith*, 55 N. J. Eq. 222, 37 Atl. 49. On the other hand, it is manifest that if the want of feeling on the part of complainant and the absence of a desire for reconciliation is due to the conduct of the defendant, he cannot well defeat relief against him by using a change or want of feeling which is due to his own misconduct. *Smith v. Smith, supra*. Mr. Justice PITNEY, speaking for the Chancery Court of New Jersey in the *Smith* case, well states the principle:

“*Volenti non fit injuria* does not apply where defendant himself is responsible for the feelings of aversion entertained by the wife. If by his conduct he has alienated her affections and given her good cause to dislike him, and to have no desire to live with him, he cannot take advantage of those feelings to excuse himself for a continued desertion without any serious and honest effort to terminate it.”

The case holds, also, that misconduct has probative value on whether refusing to resume relations is due to aversion created by such misconduct. The question is one of evidence.

Plaintiff says that when he left her in October she did want to live with him, and had no other thought or expectation; that for a long time afterwards she was willing to live with him; that she thought well enough of him; that she sent for him when the baby was sick, and that she certainly would not have done this had she not wanted to see him. While, in strictness, it is true she did not ask defendant to resume

marital relations, if we assume that in all the circumstances disclosed by the record she should have asked this of him, the foregoing is fairly equivalent to an effort on her part to have him return, made while she desired his return. If we assume that this effort must be continuous, it is true that she did not continue it. She finally reached a state of mind that makes her say that as he just went off and left her she sees no reason why she should want to live with him; that she never said anything to him about it because she thought he did not want to live with her. In time the attitude of the father to his child added to these feelings resting in wounded pride seems to have had its natural effect, and she writes him complaining that she has suffered everything for his sake, and that now he will not notice his own flesh and blood; that she would have tried to live with him but when he would not look at his own baby she just couldn't have the heart to think of living with him. As the decision here cannot be clearer than the facts upon which it is based, we have almost too fully for the purposes of an opinion set out much of the conduct of defendant and have pointed out the weakness of his excuses. These make it fairly plain that the change in the feelings of plaintiff is not merely captious. But there is more.

Defendant was asked if he had not been in trouble "about that time" (probably referring to the time at which he claims plaintiff refused to come to or live with him). He replied that, to his knowledge, he was not in trouble. Being asked if he was not then or shortly afterwards under indictment in that court he answered, "Well, not specially, I think." Being next asked whether it was not an indictment caused by trouble with another woman, he said, "Yes." To the next question, whether at that time he did have trouble with another woman, he answered, "Not that I know of." Then he was asked, "Well, you found it out later on," and he answered, "I don't quite catch your meaning." Finally being pressed with the question, "You found it out later on, anyway, you had been

having improper relations with another woman,"—he made no reply.

Plaintiff testifies that in March, 1912, she was informed defendant had another child named Roy; that its mother wrote her so on a postal card; that everybody says there is such a child; that it is younger than her own and is out west of Indianola, and that since hearing this she had never wanted to live with her husband. The trial judge asked her: "Is there any reason, if he would take you and keep you and provide for you, and live with you as your husband, do you know any reason why you couldn't do that?" She answered: "I couldn't possibly. He is the father of my baby and I will educate her all right. I couldn't possibly live with him. He has got another child, and I don't want to live with him. I am not positive he has had intercourse with any other woman since I married him, but they say he has, he said he had."

There is no denial that he said this.

The text of 14 Cyc., page 620, is, that failure to effect or attempt a reconciliation will not constitute desertion where there is just cause for such failure.

It has been held to be a defense for the wife who departed, justifiably, that after returning from a hospital to the home of her parents she remained away from her husband because he was indifferent. *Kupka's* case, 132 Iowa 195. While we do not agree with the contention in the brief of appellant, that she never refused to live with her husband, we conclude that when she finally did refuse, the refusal was justified.

VI. It is finally insisted that when the defendant testified and informed the trial court that he was now willing and able to live with his wife, and to properly care for her and her child, this was an offer of reconciliation, and that her refusal to accept the same justified the dismissal of her petition which ensued. Having found that the intent to desert existed at all times since October 10, 1910, this attempted reconciliation, if we treat it as such, was made after the

5. DIVORCE:
reconciliation:
offer after ac-
tual of cause
for divorce:
effect.

statute period had lapsed, and is not available as a defense, nor a ground for denying plaintiff relief.

An offer of reconciliation by a guilty spouse after the expiration of the statutory period of desertion does not obliterate the offense and so deprive the innocent spouse of the right to a divorce. 14 Cyc. 620.

Waiving, for the sake of argument, the contention that this attempted reconciliation came too late, it must still have been one which the court could reasonably find to be made in good faith, and likely to be fairly carried out. In the *Smith* case, *supra*, there was substantially such an offer of reconciliation and substantially such claim for its nonacceptance. The court held that, assuming what occurred to be an offer of reconciliation, the conduct of the husband in the past was such that his mere promise of amendment, if made, was insufficient; that in such circumstances there should have been some guarantee or assurance—and it is concluded that as to such an issue it is reasonable and fair to judge the future by the past.

VII. Appellee assures us by the brief of his counsel that if there be an affirmance the parties will in all probability, and in the course of time, accept a suggestion of the trial judge and resume relations; that in that event the plaintiff will have a good husband, able to provide for her, and the little girl will have a father to care for her and provide for her education; that they should be left to their own resources to reconcile whatever difficulties may exist between them, and to take up their reciprocal obligations to each other and their child. There is a remark in the *Kupka* case to the effect that there is no good reason why the parties should not adjust their differences, "which are not serious," and fulfil the marital obligations which they have assumed. This, of course, was not intended to state the essence of the decision, and on its face discloses that the differences existing are not serious. Giving to that detached phrase in that deci-

6. DIVORCE:
right to di-
vorce estab-
lished:
eleventh hour
promise to
reform.

sion every reasonable weight, it will scarcely authorize us to proceed upon the lines suggested by appellee.

Passing, for the moment, a graver matter,—the question of our power—this record hardly indicates that defendant is pining for a home in which to cherish his wife and child. Judging the future by the past, an impartial observer finds little basis for the optimism of counsel. One point not before noticed throws a sinister light on the tenderness defendant is likely to display. In the petition, the date of the marriage was fixed as in January, 1910. The answer declared, in at least two places, that it occurred in June. Defendant then went on the stand and in answer to a question which stated that this mistake in date had already been corrected, testified that the marriage took place in June. With the date already corrected, this could have no purpose except to publish that the child born in January, 1911, was begotten out of wedlock.

But, in any event, we have no power to deny divorce because of such assurances as are here given. Such may be given in every divorce appeal, as an inducement to reverse or affirm. Of course, the injured party can forgive and is not obliged to demand a divorce, no matter how much entitled thereto. But how can this court, against the protest of one who demands divorce, and has proven herself entitled to the same, refuse relief because the guilty party is of opinion that if the court will disregard the law a happy marital union may result? Where the court is convinced that the parties may and will become reconciled if there be no divorce, it may have some bearing on determining whether it be conclusively proven that a divorce should be granted. In other words, the feeling of the parties towards each other may be such as to make a reconciliation so very likely as to create a doubt whether, in spite of appearances, any serious wrong was perpetrated by one against the other—but that is surely the limit. We do not exercise the pardoning power, and no matter how sincerely counsel may be of opinion that society will be benefited more by refusing a divorce than granting it, we have no

choice where the requirements of the law are met and a litigant demands what the law grants.

We are constrained to differ from the learned trial judge, and to hold that defendant has been guilty of desertion as plaintiff charges. It follows that there must be a reversal.

VIII. In view of the result below, it is possible that the controversy as to alimony was not given any very considerable consideration, and we feel unwilling, and we might say unable, upon the record presented to us, to undertake decreeing what financial aid this defendant should give to his wife and child. We, therefore, remand this cause for a decree in harmony with this opinion, and with direction that the trial court, either upon the record now made or such additional one as it may order or the parties may desire to present, make provision in said decree for such arrangements by way of alimony as in its judgment the evidence then before it warrants.—*Reversed and Remanded.*

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

S. A. CRULL, Appellant, v. LOUISA COUNTY, Appellee.

TRIAL: Witnesses—Exclusion—Discretion of Court. The matter of
1 excluding witnesses from the courtroom during trial and what
exceptions may be properly made to such order of exclusion is
peculiarly within the discretion of the court.

PRINCIPLE APPLIED: In the instant case, being an action
against a county for damages occasioned by a defective bridge,
the court properly excepted from the order of exclusion a member
of the board of supervisors who had charge of the bridge in
question, it being convenient to counsel and the court to have
the witness present in court.

EVIDENCE: Error in Exclusion—Fact Otherwise Established. Ex-
2 clusion of evidence of a fact admitted or otherwise established
is nonprejudicial.

NEW TRIAL: Misconduct of Juror—Proceeding with Trial—Waiver.

- 3 Misconduct of a juror is not ground for a new trial when with full knowledge of the misconduct the cause proceeded without objection and the misconduct was not of a nature to prejudice the complaining party.

APPEAL AND ERROR: Erroneous Reception of Evidence Rendered

- 4 Harmless by Verdict. Testimony bearing alone on the matter of damages, though erroneously admitted, is nonprejudicial when the jury found plaintiff had no cause of action.

Appeal from Louisa District Court.—HON. JAMES D. SMYTH,
Judge.

THURSDAY, FEBRUARY 18, 1915.

AN action for damages resulting from a defective bridge. There was a verdict for the defendant and judgment entered thereon. The plaintiff appeals.—*Affirmed.*

Molsberry & Reaney, for appellant.

Weaver, Briggs & Erwin, for appellee.

EVANS, J.—The bridge in question was maintained by the defendant county across the Iowa River. The plaintiff was moving a traction engine along the highway under its own power. He entered upon the east approach to the bridge which gave way at the third span and precipitated the engine to the ground beneath. The damages claimed are for the most part such as resulted to the engine.

The engine in question weighed something more than twenty thousand pounds. The bridge was quite old. The accident was such that the jury could have found that it was badly decayed and that its planks were badly worn. The plaintiff was quite familiar with the bridge as far as its casual appearance was concerned. The evidence was sufficient to justify a finding that the county was negligent in its care and

maintenance of the bridge. We think it was also sufficient to justify the finding that the plaintiff was guilty of contributory negligence in driving his engine upon it in its apparent condition.

I. The first error assigned is that the trial court made an improper order for the exclusion of witnesses during the trial in that he excepted from such order the witness Farmer. This

1. TRIAL : wit-
nesses : exclu-
sion : discre-
tion of court. witness was a member of the board of super-
visors at the time of the accident and had
special charge of the territory including this
bridge. The attorneys for the defendant re-
quested his presence during the trial for the purpose of con-
sultation. The appellant complains of the exception made in
his favor. The question involved was not one of favor to the
witness but of convenience to the counsel and to the court.
The order was a reasonable one and therefore clearly within
the court's discretion.

II. The plaintiff offered to prove that after the accident,
Supervisor Farmer caused danger signs to be placed at each
approach to the bridge. Some evidence was received that such
signs had been placed. This was ruled out as

2. EVIDENCE :
error in exclu-
sion : fact
otherwise
established. immaterial because the time referred to was
after the accident. Thereupon the plaintiff
propounded certain questions to the same
witnesses as to whether such signs had been placed *before* the
accident. Objections to this evidence were also sustained.
The witnesses who were thus interrogated were the plaintiff,
his son Lawrence, and Harry Wilson. It appeared from the
evidence of the plaintiff and his son that the danger signs
which they saw were erected after the accident and not before.
Objections to the evidence of Wilson were sustained before
it had proceeded thus far. It does appear from his testimony
that he did not know of any signs being put up by the super-
visor before the accident.

It is now urged that the trial court erred in refusing to
receive evidence of the erection of such danger signs at the

approaches of the bridge *before* the accident. Granting that evidence of such a nature would have been ordinarily admissible as tending to show knowledge on the part of the supervisors of the dangerous condition of the bridge, yet we are satisfied that the ruling was clearly nonprejudicial for two reasons. It appears affirmatively that the signs which these three witnesses had in mind were those erected after the accident. It is true the witnesses might have changed their testimony if permitted to answer the later questions. But we would not be justified in reversing the case upon such an assumption. There is the further reason that the knowledge of the supervisors of the actual condition of the bridge was practically conceded. It had been inspected and repaired two months before the accident. It was an old bridge and the defects complained of were the result of age and decay of which the supervisors were presumptively cognizant. The real fighting point in the case was whether the plaintiff was guilty of contributory negligence in driving his ten-ton engine upon it, he himself being familiar with the bridge and knowing its general condition. While it was concededly known to the supervisors that there was considerable decay at the ends of the stringers, the breaking point was in the center of the stringers where there was no apparent decay. From the record as a whole it is evident that the defendant was beaten on the ground of contributory negligence.

For these reasons we are satisfied that the plaintiff suffered no possible prejudice by the exclusion of the offered testimony.

III. After the verdict a motion for a new trial was filed by the plaintiff. Among other grounds misconduct of the jury was alleged. The alleged misconduct is set forth in the bill of exceptions as follows:

8. NEW TRIAL:
misconduct of
juror: pro-
ceeding with
trial: waiver.

“During the progress of said trial and while plaintiff was offering testimony to prove his claim, a Mr. T. A. Mulchy was

called by the plaintiff and after said Mulchy had testified, he casually met one of the jurors engaged in the trial of the case and who was a member of the panel that returned the verdict against the plaintiff, and the said juror stated to said witness, 'They did not cross him on the witness stand,' and the witness replied, 'That he was telling the truth, and when a man tells the truth it is impossible to shake his testimony,' and that he (the said witness) 'did not overstate any of the facts.' Plaintiff's attorneys, upon being advised of the conversation had between the juror and the witness, called the subject to the attention of the judge, who was holding court at the time of the trial, His Honor, JAMES D. SMYTH, and defendant's attorneys. Thereafter, and at the next adjournment of the court, the court, as he had done at each adjournment during the trial, admonished the jurors that they should communicate with no one concerning the case, and at this adjournment further observed that his attention had been called to the fact that one juror had inadvertently failed to heed his instructions, and further stated that such conduct was highly improper, and expressed the hope that it would not occur again."

The error assigned at this point is that the court should not have permitted the trial to proceed but should have discharged the objectionable juror. It is enough to say that no request or suggestion of that kind was made during the trial. On the contrary the plaintiff proceeded with the trial without objection after full knowledge of the alleged misconduct. The conversation with the juror which was complained of was had with the plaintiff's own witness. It does not appear to have been of such a nature as to indicate prejudice to the plaintiff. The argument is that the juror was probably terrified by the admonition of the court. But the matter was brought to the attention of the court by the plaintiff's counsel for the very purpose of admonition. There was nothing in the admonition of the court which could tend to the disqualification of the juror.

IV. Various miscellaneous matters are complained of. One witness testified to the cost of repairing the water tank. His competency is challenged. The testimony bore only on the amount of damage. It has wholly lost its significance by the adverse verdict as to the existence of the cause of action. Complaint is made that the instructions failed to advise the jury that the county could act only through its agents. There was no apparent necessity for an abstract statement of that kind. No instruction was requested by the plaintiff. The instructions did advise the jury that the duty of care rested upon the board of supervisors as the proper officials of the county and that notice to them was notice to the county. This was sufficient and specific. The record before us would readily have sustained a verdict for the plaintiff, and we should have been quite as well satisfied with such a verdict; but the record is free from any error which would justify a reversal.

4. **APPEAL AND ERROR:** erroneous reception of evidence rendered harmless.

The judgment below is therefore—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

MARY A. MEYER, Appellant, v. FRED H. MEYER, Appellee.

DIVORCE: Cruelty—Incompatibility of Temper. Incompatibility of 1 temper is of itself no ground for divorce. Evidence reviewed generally and *held* not to establish cruel and inhuman treatment.

Appeal from Buchanan District Court.—HON. J. F. CLYDE, Judge.

THURSDAY, FEBRUARY 18, 1915.

ACTION for divorce on the ground of cruel and inhuman treatment. Decree for the defendant dismissing plaintiff's petition. Plaintiff appeals.—*Affirmed*.

Feely, Feely and Clark, for appellant.

Sager & Sweet, for appellee.

GAYNOR, J.—This is an action for divorce, based on the grounds of cruel and inhuman treatment, endangering the life of the plaintiff. The cause was tried to the court in open

1. DIVORCE:
cruelty: in-
compatibility
of temper.

court, and, upon submission, a decree was entered for defendant dismissing plaintiff's petition. From this the plaintiff appeals.

This is surely a fact case. No good purpose would be served by setting out the evidence upon which the plaintiff predicates her right to a divorce. The record is long and the complaints are many. Most of them appear to us to be trivial. It is true that life is made up of little things. No human being has ever lived so perfectly that, in all his life, when it was scanned with care, there could not be found some instance in which he failed to live up to the standard of those high ideals of human life by which we measure others. In judging these parties and in adjusting their trouble, we must consider the whole record of all the years they lived together. We must not judge them by one instance, or two instances in which they failed to come up to the full measure of responsibility, but must judge them in the larger light of all the disclosures. Neither of these parties is wholly without blame. We doubt if one is more to blame than the other, and we are inclined to think that if other influences had not come into the home life, jarring and disturbing as they were, this case would not be here for our consideration. Many of the things of which plaintiff complains were never voiced until this controversy arose. Many of the facts of which she now complains did not, at the time of their occurrence, appear to her in the light in which this record seeks to place them. There was no occasion for suppressing the complaints then if these things actually appeared to her in the light in which she would now have them appear. We cannot believe that her life, or even her health, has been in the least danger by any act of the defendant. Mere incompatibility of temper, the mere fact that they are not congenial to each other now, the fact that the love that first drew them together has not found full fruition in the

years that have intervened, however unfortunate it may be that it is so, does not justify us in severing the bonds. Nor does the fact that the plaintiff is now straining at the leash justify us in severing the leash that binds her. There are children here whose future is involved in this controversy. There is nothing in the relationship of the parties to indicate that a continuation of this relationship will prevent a full discharge of the duties which they owe as parents to these little children—duties imposed by law and born of natural instinct. We admonish these parents to look more seriously upon the duties that have grown out of their relationship—the duties they owe to other lives that have come out of their relationship.

Whatever we may think of the conduct of these parties towards each other, one thing is manifest, that there is no showing in this record that a continuation of the relationship has or will endanger the life or health of this plaintiff. We find no grounds for disturbing the judgment of the court below, and the case is—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

JOHN PRICE et al., Appellants, v. VALLIE PRICE EWELL et al.,
Appellees.

WILLS: Construction—Life Estate or Fee. The following will

- 1 grants to the wife, she remaining unmarried, a life estate only:
 "I do give and bequeath to my wife . . . the entire residue
 (after payment of my debts) of my property, personal and real,
 . . . to have and to hold in her exclusive right so long as she
 shall remain unmarried . . . and in case of her marriage, my
 estate, personal and real, shall be divided . . . one-third to
 my wife and the remainder to my children. In case of the death
 of my wife . . . before there shall have been a division of
 my estate, as above provided for, I give and bequeath said
 estate to my children."

PARTITION: Appeal—Trial De Novo—Determination of Shares—
 2 Remand. The trial *de novo* of partition proceedings involves the

determination of the respective shares without remand to the lower court.

PARTITION: Tax Sale—Reimbursement. Owners, on partition, are
3 entitled to reimbursement out of the property as a whole for the amount necessarily paid to effect redemption from tax sale.

Appeal from Lee District Court.—HON. H. BANK, JR., Judge.

THURSDAY, FEBRUARY 18, 1915.

SUIT for partition of real estate. The plaintiff was adjudged to have no interest therein and his petition was dismissed. He appeals.—*Reversed.*

T. B. Snyder and Leggett & McKemey, for appellants.

J. R. Frailey, for appellees.

EVANS, J.—The defendant Storms is the grantee of his co-defendants and as such interposes the only defense made. The plaintiff Rosa Price is the wife of John Price and has no interest in the subject of the controversy except as such wife. Both parties to the controversy, viz.: plaintiff John Price and defendant C. W. Storms, rest their claim of title upon the will of Patrick Price, the former owner of the property. Patrick Price died testate in September, 1888, seized of the property. He left surviving him his widow Gemima and four children. Two of his children, Robert and John, were by a previous marriage. The other two children, Charles and Vallie, were children of the wife Gemima. After the death of Patrick, Robert died intestate, leaving no widow or child surviving. The will of Patrick contained the following provision:

“I do give and bequeath to my beloved wife, Gemima Price, my homestead, consisting of house and two and one-half lots on Fifth street, Fort Madison, Iowa, and the entire residue of my property, personal and real, after my funeral expenses shall have been defrayed and all my debts paid, to have and

1. WILLS: construction: life estate or fee?

to hold in her exclusive right so long as she shall remain unmarried, provided, only, that if either of my sons, Robert, Sandy, John or Charles Anderson, shall marry, and shall so desire, he shall have the privilege of building upon any vacant portion of the homestead, and shall have the privilege of occupying and using such building as a home, and provided that in case of her marriage, my estate, real and personal, shall be divided as follows:

"One-third to my wife, Gemima, and the remainder divided equally among such of my children as shall have lived respectable lives; but if either of my sons above named shall have been convicted of a felony or if either of my daughters shall have been proven guilty of lewdness, such son or daughter shall thereby forfeit all right of inheritance under this will.

"In case of the death of my wife Gemima Price, before there shall have been a division of my estate as above provided for, I give and bequeath said estate to my children to be equally divided among such of them as shall have maintained reputable lives as above defined."

It is the claim of the plaintiff that by this will the widow Gemima took only a life estate in the property; whereas, the defendant Storms contends that the widow Gemima took a fee simple estate under such will, which she later devised by her own will to this defendant's grantors; and this presents the only disputed proposition in the case. The trial court held that the widow Gemima took a fee simple estate under the will of Patrick. Such holding cannot be sustained. A devise of real estate to a widow to be held during her widowhood is a life estate subject to being terminated by the marriage of the widow. This was the rule at common law and it has frequently been applied by this court. The recent case of *Brunk v. Brunk*, 157 Iowa 51, is decisive of the question involved. To the same effect is *Convey v. Murphy*, 154 Iowa 421; *Archer v. Barnes*, 149 Iowa 658. Appellee places special

reliance upon *Busby v. Busby*, 137 Iowa 57, and contends that it rules the case before us. By the will involved in the *Busby* case one paragraph thereof purported to convey to the widow a fee simple estate. A subsequent paragraph purported to attach to the devise a condition subsequent whereby the devisee was required to remain the widow of the testator. Such condition was performed by the devisee. The will did not purport to devise any remainder over after the termination of the alleged life estate. Giving effect to the express terms of the will, it was held in that case that the provision as to widowhood was imposed as a condition upon the devise rather than as a limitation upon the duration of the estate. The will purported to devise all of the testator's estate and this apparent purpose of testator to dispose of all of his estate would have been defeated by a contrary holding. In the case before us the will gave the property to the widow "to have and to hold in her exclusive right *so long as she shall remain unmarried.*" The remainder over after the termination of the life estate was fully disposed of to other parties.

II. It is averred in plaintiff's petition that he is entitled to ten twenty-fourths of the property involved; that is to say that he took six twenty-fourths under his father's will and two-thirds of six twenty-fourths by inheritance from his deceased brother Robert, he being a brother of the full blood, whereas the other brother and sister were of the half blood only. These facts appear by stipulation and no issue has been made upon this basis of division except by a general denial and by the plea that the will of Patrick devised a fee simple estate to Gemima. It is suggested in appellee's argument that in the event of a reversal the case should be remanded for a rehearing as to the respective shares of the parties. That question, however, is necessarily involved in the case as made and is here for trial *de novo*. Upon the submission of the case in the court below the plaintiff was entitled not only to the determination of the fact that he had an inter-

2. PARTITION:
appeal: trial
de novo: de-
termination of
shares: re-
mand

est but also the extent of such interest, and was entitled to a decree confirming shares accordingly. And this measures the relief to which he is entitled upon a trial *de novo* here.

III. In January, 1912, the plaintiff paid \$62.41 in redemption of the property from tax sale. His right to a reimbursement therefor was recognized in the court below and should be recognized in the final distribution of funds. It is our conclusion that upon the record before us plaintiff is entitled to a decree confirming his share at ten twenty-fourths of the property involved. He is also entitled to a charge against the property as a whole for \$62.41 with interest thereon from January 7, 1912.

8. PARTITION :
tax sale : re-
imbursement.

The decree below is accordingly—*Reversed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

RAY COAL MINING COMPANY, Appellee, v. JOHN Y. ROSS et al.,
Defendants and Appellants.

CONTRACT: Construction—Different Rights—Entirety. A contract

1 granting to second party the right to mine coal under eight different tracts of land at certain royalties, a different time limit being placed on each tract ranging from 3 to 20 years, second party having the option to mine or not to mine with no liability for damages if he did not, but second party agreeing to first mine the coal from under the said land, where the time limit was the least, "at the earliest moment practicable," was held to be an *entirety* and that second party by allowing the time limit to expire as to several tracts without notice of an intention to exercise its option thereby lost its right to exercise any option as to those tracts which had not yet expired by the terms of the writing. *Held* also, second party was not bound under the contract until he gave notice of intention to exercise his option.

CONTRACT: Abandonment—Intent—Non-User. Abandonment of a

2 contract involves an intent and purpose to surrender the rights acquired. Non-user may not of itself constitute abandonment but if accompanied with other circumstances evincing such an

intention, on which the other has acted, an abandonment is effected.

Appeal from Polk District Court.—HON. CHAS. S. BRADSHAW,
Judge.

SATURDAY, FEBRUARY 20, 1915.

ACTION to cancel certain rights in coal land acquired under an agreement with the owner. Judgment and decree for the plaintiff.—*Affirmed.*

Read & Read, for appellees.

Clark, Byers & Hutchinson, for appellants.

GAYNOR, J.—On the 21st day of February, 1909, J. A. Garver and Helen A. Garver, his wife, and one John Y. Ross entered into the following agreement:

1. CONTRACT :
construction :
different
rights :
entirety.

This Article of Agreement made and entered into this 21st day of February, 1908, by and between J. A. Garver and Helen A. Garver, his wife, parties of the first part and John Y. Ross, party of the second part, all of Polk County, Iowa, Witnesseth:

The parties of the first part hereby grant unto the party of the second part the right to mine the coal from under the following lands for and during the several times mentioned hereafter with each of the following separate parcels or tracts of land, to wit:

1. The Northwest quarter of the Northeast quarter for the term of twenty years from date.

2. The west five acres of the North half of the Southwest quarter of the Northeast quarter, and the East fifteen acres of North half of the Southwest quarter of the Northeast quarter to and until March sixteenth, A. D. 1911.

3. The South half of the Southwest quarter of the Northeast quarter to and until February ninth, A. D. 1912.

4. The West half Northwest quarter of the Southeast quarter to and until June 19th, A. D. 1913.

5. The East half of Northwest quarter of the Southeast quarter to and until April 15th, A. D. 1911.

6. The Northwest quarter of the Northeast quarter of the Southeast quarter for the period of twenty years from February 1, 1908.

7. The Northeast quarter of the Northeast quarter of the Southeast quarter to and until March fourth, A. D. 1912.

All the above described tracts of land being in Section number nineteen in Township seventy-eight North, Range twenty-four west, containing in all one hundred thirty acres.

The party of the second part shall have the right to install entries, construct passages, tramways or railways underground for the purpose of removing the coal underneath the lands hereinbefore described to any hoisting shaft which he may sink or construct upon other lands or upon the aforementioned tracts of land after securing the right to sink said hoisting shaft from the owners of the surface, the party of the first part being the owners only of the coal underlying said lands, and having the right to mine and remove said coal but having no rights to the surface.

The party of the second part is to pay to the parties of the first part the sum of ten and one-half cents for every ton of 2,000 pounds of merchantable lump coal mined from said lands, and passing over a screen with bars not over one and three-eighths inches apart. Mine run coal unscreened is to be paid for at the rate of seven cents per ton of 2,000 pounds.

Said royalty of ten and one-half and seven cents is to be paid to said first parties on or before the 20th day of each month for the coal mined from said lands during the preceding month and at the time of said payment the party of the second part agrees to furnish party of first part with a statement of the number of tons of each kind mined during the preceding month. No royalty is to be paid on any pea, nut or slack coal mined.

It is further agreed that all screened lump coal mined and also all mine run coal shall be correctly and accurately weighed upon perfect scales by competent and honest weighmen without delay and a record kept of same. After the expiration of each calendar month and within twenty days thereafter, said second party shall furnish said first party at his (second parties') office in Des Moines, a detailed statement in writing of all coal mined during the preceding month, and the quantity and kind lump or mine run mined with names of the persons mining same and the amount mined by each. Said statement to be under oath when so demanded in writing by said first party.

Said second party agrees to preserve unaltered the daily bulletin, records, pay roll, and books by which miners are paid for mining said coal for one year previous, which bulletins, records, payrolls and books shall show the name of each miner and where such miner worked during preceding month, and said first party by himself or agent shall have right to examine same at all reasonable times.

The said party may use the right of way under the surface and the entries under the surface for the purpose of removing and mining coal from other and adjoining lands leased or owned by him.

The second party shall not be liable for any damage caused to surface on account of caving of the surface by reason of removing coal or the pumping out of water. Said royalties being full compensation therefor.

It is understood and agreed that the said party of second part, however, shall not be held liable or bound to take said coal or mineral except at his option, and in event of his abandoning or not making the purchase thereof as herein provided, he shall not be held liable for any damages or compensation therefor, or growing out thereof.

It is expressly agreed and understood that neither of the parties hereto have any right to enter upon the surface of said land, that said second party must procure said right from the

present owners of said surface if they desire to so enter upon said surface for any purpose whatever.

The second party agrees to mine the coal from under the said land where the time limit is the least at the earliest moment practicable, so as if possible to have the coal mined before time limit expires.

This instrument of agreement was, on or about the month of July, 1909, assigned by the said John Y. Ross to the defendant, the Iowa Coal Mining Company. Thereafter, the name of this defendant was amended and changed to the Des Moines Coal Company, and the Des Moines Coal Company, defendant, is a successor in interest to the Iowa Coal Mining Company, and entitled to whatever rights it had under said instrument.

It appears that neither John Y. Ross nor either of the coal mining companies, defendants, took any action under this lease. They never mined or attempted to mine any of the coal under the land described in said lease. It appears that whatever right they acquired under said lease to mine coal under the land described in the 2nd, 3rd, 5th and 7th divisions of the lease has expired by the terms of the lease itself. The only rights in controversy in this suit are the rights, if any, acquired by John Y. Ross and assigned to these other defendants in the land described in the 1st, 4th and 6th divisions of the lease.

The plaintiff brings this action to enjoin the defendants from mining or removing coal, and prays that the contract hereinbefore set out be declared forfeited, and the same cancelled, and the defendants be restrained from having or claiming any interest in or right to the coal underlying the premises described in the 1st, 4th and 6th divisions of said instrument, and that they be restrained from interfering with the plaintiff in the mining and removing of coal under said land.

It appears that on the 16th day of February, 1912, the said John A. Garver and Helen A. Garver entered into the following written agreement with the Ray Coal Mining Com-

pany, plaintiff herein, which, so far as material, provides as follows:

"The parties of the first part do hereby grant to the party of the second part, upon the terms and conditions stated in this agreement, the right to mine and remove the coal underlying the surface of the following described premises, situated in the County of Polk and State of Iowa, to wit: The Northwest quarter of the Northeast quarter and the Northwest quarter of the Northeast quarter of the Southeast quarter, all in Section nineteen, Township seventy-eight, Range twenty-four for a period of ten years from and after the date hereof, but not longer, and the West one-half of the Northwest quarter of the Southeast quarter of Section nineteen, Township seventy-eight, Range twenty-four, for a term commencing on the date hereof and ending June 19th, A. D. 1913. And subject to all rights of the present owners of the surface of said lands and to such arrangements as the party of the second part may make with them, the parties of the first part further grant to the party of the second part the right and privilege of prosecuting and drilling, or otherwise testing the coal underlying the surface of said premises, in order to determine the amount of mineral and coal underlying said premises, and to make such underground entries and perform such work as is necessary for the successful and proper mining and removal of said coal, it being understood and agreed that the parties of the first part are not the owners of the surface of said premises, and do not grant or undertake to grant any rights therein or thereon."

This lease is the basis of the plaintiff's right to maintain the action. John A. Garver and wife filed a petition of intervention in which they join with the plaintiff in asking the relief prayed for against all the defendants.

On the issues thus tendered, a decree was entered for the plaintiff and interveners as prayed, and from this decree defendants appeal.

It will be noticed that the land described in the agreement entered into on the 16th day of February, 1912, between the Garvers and the plaintiff is the same land described in the 1st, 4th and 6th divisions of the lease between the Garvers and John Y. Ross, under which defendants claim, and it will be further noticed that the time limit fixed for this land between the Garvers and John Y. Ross has not expired by its terms; that the time limit fixed for all the other land described in the lease has expired by the terms of its own limitation.

It will be noticed further that the rights to the land described in the 2d division of the Ross agreement expired on March 16, 1911; to the land in the 3d division on the 9th day of February, 1912; to the land described in the 5th division on April 15, 1911; to the land in the 7th division on March 4, 1912; and it will be further noticed that by the last clause of the lease between Ross and the Garvers, Ross agreed to mine the coal from under the land where the time limit is the least, at the earliest moment practicable, so as if possible to have the coal mined before the time limit expired.

It will be further noticed by the terms of this contract, that it was understood and agreed that Ross was not held liable or bound to take the coal or mineral under any of the land except at his option, and that in the event he abandoned or did not make the purchase thereof as provided in the contract, he should not be held liable for any damages or compensation therefor or growing out thereof.

It further appears from this record that neither Ross, nor the companies claiming under him, ever gave the Garvers any notice that they elected to take under said lease, or sought to avail themselves of the option therein given at any time before the making of the lease to the plaintiff, or the commencement of this action. It not only appears that nothing was done by Ross, or those claiming under him, in the way of mining coal or making efforts to mine coal from any of the land, but that Ross and his assignees allowed whatever right they had to mine coal from the land described in the 2nd, 3rd,

5th and 7th divisions of the lease to expire by the limitation therein expressed, and it appears that in allowing their rights to expire, they lost by such time limit any right to the East half of the Northwest quarter of the Southeast quarter which separates parts of the land in controversy, to wit, separates the West half of the Northeast quarter of the Southeast quarter from the Northwest quarter of the Northeast quarter of the Southeast quarter. This lease was an entirety with, however, different time limits as to different portions of the land.

There is nothing in the lease itself, or in this record, indicating a purpose or intent upon the part of either party to this original contract, that Ross or his assignees should have a right to avail themselves of some of the provisions of the other portions of the lease in their favor, and abandon other portions of the lease. It seems to have been contemplated by the terms of the contract itself, that if the grantee therein named, Ross, desired to avail himself of the provisions of the lease, he should proceed at once, or without unreasonable delay, to mine the coal from under the land where the time limit is the least, and, if possible, to have the coal mined from such land before the time limit expired. This was not done. No effort to accomplish this purpose was made by Ross or his assignees. The contract was an entirety.

The only question in this case is a question of fact to be ascertained from the contract itself and the conduct of the parties subsequent to the making of the lease. A careful

2. CONTRACT: review and analysis of the whole record satisfies us that, even if it be conceded that it was
 abandonment: intent:
 non-user. not a mere option, still the defendants must
 be held to have abandoned whatever rights they acquired in the contract to the land now in dispute. Abandonment involves an intent and purpose to surrender the right acquired, accompanied by acts indicating that purpose and intent. It is a question of fact and not of law. See 2 Washburn, Real Property, 82.

Of course, mere non-user of a right acquired by contract

does not, in itself, constitute an abandonment of that right, but non-user coupled with other circumstances and conditions which expressly show an intention to abandon, when acted upon by the other party, interested, has the effect of destroying the rights acquired.

However, a careful analysis of the agreement upon which defendants depend for their rights in this case makes it, we think, reasonably plain that Ross was not bound or obligated under the contract until he elected to take the coal and be bound by the contract. There is practically no dispute in the evidence in this case, and we do not feel called on to set it out, but are contented to say that we have made a careful study of the record before reaching the conclusion announced. We think the decree of the trial court is right, and it is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

FIRST NATIONAL BANK OF SHENANDOAH, IOWA, Appellee, v.
ADDIE HALL, Appellant.

TRIAL: Directed Verdict—Test to Determine—Allowable Inferences.

- 1 When the court is met by motion to direct a verdict it should carry to the aid of the evidence every permissible inference in support of the issues. In instant case, motion improperly sustained.

PRINCIPLE APPLIED: Action on note. Plaintiff's evidence showed in the most positive manner the full, free, intelligent and undoubted execution and delivery of the note. Defendant's evidence showed that her eyesight was very poor and showed in an equally positive manner that defendant never saw the note, never signed it and never had any talk about signing it; or that if defendant did sign it, she was tricked into so doing through the fraud of her attorney, while signing a petition for divorce. *Held*, (a) the jury might have found that the minds of the parties never met—no contract was ever made; and (b) that she had a right to rely implicitly on what her attorney told her and was

excusable in not asking her sons to read the instrument to her. *Held*, motion for a directed verdict was improperly sustained.

Appeal from Page District Court.—HON. THOMAS ARTHUR, Judge.

TUESDAY, FEBRUARY 23, 1915.

ACTION on a promissory note resulted in a directed verdict for the plaintiff on which judgment was entered. The defendant appeals.—*Reversed*.

Seerley & Clark and Parslow & Peters, for appellant.

T. S. Stevens, for appellee.

LADD, J.—This is an action on a promissory note for \$750, alleged to have been executed by the defendant December 31, 1910, to Earl R. Ferguson and C. R. Barnes, payable sixty days after date and endorsed by them to plaintiff for value before maturity. A credit of \$250 was admitted and the evidence that plaintiff took the note as collateral security for an existing indebtedness was undisputed. The defenses interposed were that defendant did not sign the note and that, if she did, she did so supposing she was signing a petition for divorce and that the signature was obtained by fraud.

After the evidence had been introduced, a verdict for plaintiff was, on its motion, directed and this ruling is the only error assigned for review.

Counsel for appellant concede that defendant may have signed the note but contend that the issue of whether she was induced so to do by fraud should have gone to the jury. The payees were partners and as such, engaged in the practice of law at Shenandoah. Robert Hall, at the instance of defendant, his mother, consulted Ferguson about obtaining a divorce and arranged for him to call on her at her home in the country. Ferguson prepared a petition therefor and a note to

1. TRIAL: directed verdict: test to determine: allowable inferences.

himself and Barnes for \$750 and with his brother, who was a notary public, repaired to defendant's home. According to Ferguson's testimony, somewhat corroborated by that of his brother, he read the petition to defendant, correcting it where necessary, and she then signed the affidavit attached and made oath thereto before his brother; that he then read the note over to her and she signed it and gave it to him; that the amount had been agreed upon between him and Robert, "that the fee was to be contingent on success and that this was explained to her; and that whatever the husband was required in the decree to pay would be endorsed on the note. On the other hand, the defendant testified that nothing was said about signing any paper other than the petition, that there was no talk concerning a note or of signing a note; that she could not see well enough to tell whether the signature to the note in suit was hers, but upon examining it with a magnifying glass, thought it was her signature; that she was in feeble health and her eyesight very poor so that she could not see well enough to read at the time but relied on what Ferguson told her the paper was and wrote her name where he directed; that Ferguson said he wanted \$750 for his services and the expenses incident to the suit and on her suggestion that this was pretty high, remarked that it made no difference to her as it would come out of her husband; that she signed no paper other than the petition and no paper other than the petition was presented to her. Robert Hall denied that anything was said about the fee to be charged when he consulted Ferguson; corroborated his mother's testimony concerning what was said about fees at her home; testified that, though in the room, he did not hear Ferguson read the note to his mother; that he did not see a note there and that there was no conversation about a note and that his mother could not read, owing to ill health and poor eyes. To avoid a continuance, plaintiff admitted that George Hall, if present, would testify that he was in the room when the note is said to have been signed; that a note was not then signed; that "no

mention was made or anything said of any note being given"; that Ferguson stated that no claim would be made against defendant for any fees in connection with the divorce suit and that all he would expect would be those allowed by the district court from the property of the husband. This is the substance of the evidence and in passing on its sufficiency to carry the issue of fraud in the inception of the note to the jury, it, with every permissible inference in support of the charge, must be taken into consideration. Certainly the jury might have found that the note was not exhibited to the defendant, that she did not see it to know what it was; that it was not referred to in any conversation and if she signed it, this was not done knowingly or intentionally. Had she, without fault on her part, signed the note under the misapprehension, induced by the payee, that it was an instrument of another character, she would not have been bound thereby. *Green v. Wilkie*, 98 Iowa 74; *Eldorado Jewelry Co. v. Darrell*, 135 Iowa 555.

This is for the reason that there would not have been an intelligent assent to the terms of the contract—no meeting of the minds of the parties thereto. This is quite as true where a person has in some manner, whether from indirection or otherwise, signed a promissory note when not conscious of so doing. No man can well be made a party to a contract without his own consent. The mind must act in the execution of the particular agreement and it must be executed as and for what it purports to be. If the mind is drawn away from it by fraud or otherwise and the party is induced to sign it through some scheme or accident, as and for another instrument than that which it purports to be or was to do, then there is no consent and no delivery made or authorized to be made of the papers so signed.

In *Foster v. MacKinnon*, 4 C. P. 704, ^{Boyles}Boyles, J., said: "The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently mis-

described to him; that when he signed one thing, he was told and believed he was signing another and an entirely different thing; and that his mind never went with his act. . . . It seems plain on principle and on authority, that if a blind man, or a man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force; and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended." See also *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. R. 675.

Most of the cases are where the maker has been deceived into signing a contract or note under the supposition that it was a different instrument; but if signed unintentionally,—that is, when unconscious of signing,—the paper thus signed is quite as vulnerable to the objection that it is not the contract of the signer as though this were induced by deceit. Thus in *Kagel v. Totten*, 59 Md. 447, the defendant swore that he signed duplicate agency contract but did not sign a promissory note; and though his name attached to the note sued on was genuine, the court, since he was an illiterate man, held the issue as to his liability should have been submitted to the jury. In *Puffer v. Smith*, 57 Ill. 527, the defendant signed an agency contract for the sale of a cultivator and seeder and was later sued on a note bearing his signature, though he swore that he did not sign a note, and the court upheld a judgment in his favor in an action thereon, saying: "The reasonable inference is that the note sued on was the result of deception and trick practiced on the defendant in

error." It seems very clear that if the maker never intended to sign the instrument, whether it be a contract or promissory note, the signature cannot be regarded as his act in contemplation of law.

The difficulty in such a case is to exculpate himself from the charge of negligence in the signing of the note which is essential to defeat a negotiable instrument in the hands of an innocent purchaser for value. *Douglas v. Matting*, 29 Iowa 498; *Williams v. Stoll*, 79 Ind. 80, 41 Am. R. 604.

It is well settled that if a person who can read signs an instrument without reading, or satisfactory excuse for not doing so, this is such neglect as will preclude him from asserting that he was misled as to the character of the instrument in executing it. *Wright v. Flynn*, 33 Iowa 159; *Chapman v. Rose*, 56 N. Y. 137, 15 Am. Rep. 401; *Ort v. Fowler*, 31 Kans. 478, 47 Am. R. 501.

And even though a person may not be able to read, if others are present who can read, and upon whom he may call for assistance, and he signs without invoking their assistance, he is precluded from interposing a defense on the ground of fraud. *Green v. Wilkie*, 98 Iowa 74; *Shores-Mueller Co. v. Lonning*, 159 Iowa 95, and cases cited. *Brown v. Feldwart*, 80 Pac. (Ore.) 414.

Reverting to the evidence, it is to be said that the defendant was a woman little accustomed to business, in feeble health, with eyesight so defective that she could not read. Transacting the business with her was an attorney whom she had employed through her son the day previous. Contrary to the suggestion of appellee, the relation of attorney and client had been established; at least the jury might have so found. Ferguson owed her absolute good faith throughout the transaction and although two sons who could read were present, she cannot be held negligent, as a matter of law, if she relied on Ferguson without invoking their assistance. That issue was for the jury. The jury might have found that

the note was not mentioned and therefore she would not be put upon inquiry as to signing such an instrument.

If her testimony and that of her sons were to be relied upon by the jury, it might have found that through some trick or deception, or without these, her name was attached unconsciously to the note. It was not necessary in order to carry the issues to the jury that precisely how this happened, if at all, should have been explained. It is enough that without knowing or intending to sign the note, her name was attached thereto, providing this was without fault on her part, for though fraud is alleged, no more was necessary to be proven than sufficient to defeat recovery, and this issue at least should have been submitted to the jury. It follows that the court erred in directing a verdict for the plaintiff.—*Reversed.*

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

WARREN HOUGH, Adm., Appellee, v. ILLINOIS CENTRAL RAILROAD COMPANY et al., Appellants.

APPEAL AND ERROR: Instructions—Presumption That Jury

- 1 **Obedied.** It will be assumed that the jury obeyed the instructions of the court and the cause will be considered on appeal from that standpoint.

PRINCIPLE APPLIED: Action for personal injuries. Plaintiff assigned three grounds of negligence, to wit, (1) failure to give statutory whistle and bell signals; (2) failure to give other signals of the approach of the train and to slacken speed owing to obstructions hiding view of the train; (3) permitting weeds and brush to grow along right of way and hide approach of train. The engineer was made a defendant. The court ordered the jury to return no verdict against the engineer under any circumstances if they found that the bell and whistle signals were given as required by statute. The jury returned a verdict against the railroad company and also against the engineer. *Held*, the case would be treated on appeal from the standpoint that the verdict was based on the failure to give the statutory whistle and bell signals.

RAILROADS: Negligence—Statutory Signals—Failure to Give—Liability of Employees. The employees of a railway company, as well as the company itself, are liable in damages for instant death resulting in failure to blow the whistle and to ring the bell on approaching a crossing as required by Sec. 2072, Code, said section creating no new cause of action but a "rule of evidence" as to what acts constitute negligence *per se*.

RAILROADS: Negligence per se—Violation of Statutory Duty. The violation of a statute imposing a duty is negligence *per se*. Rule applied in instant case for failure to blow the whistle and ring the bell on a railway engine on approaching a crossing as required by Sec. 2072, Code.

RAILROADS: Negligence—Contributory—Facts Not Showing. Evidence reviewed and held not to show contributory negligence *per se*.

DEATH: Damages—Measure of—Present Value. "The present value of what one might have saved" is the measure of recovery for death. Instructions in instant case held correct.

RAILROADS: Negligence per se—Vegetation Along Right of Way. Whether permitting weeds and brush to grow along right of way so as to obstruct view of trains constitutes negligence *per se*, *query*.

TRIAL: Instructions—Erroneous—When Cured by Verdict. An instruction, erroneous in fact, may be cured or rendered harmless by verdict.

PRINCIPLE APPLIED: An instruction that the act of permitting weeds and brush to grow along a railway track so as to obstruct the view of approaching trains is negligence *per se*, if admitted to be erroneous, is harmless when the verdict is based only on the negligence resulting from failure to give the statutory signals.

DAMAGES: Death—Excessive Verdicts. A verdict for \$8,000 for death, reduced by trial court to \$6,000, is approved, deceased being a farmer, 26 years old, of sound body, industrious, of good habits, earning from \$35 to \$40 per month with board and having saved enough to buy a horse, buggy and town lot.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

WEDNESDAY, DECEMBER 16, 1914.

REHEARING DENIED TUESDAY, FEBRUARY 23, 1915.

ACTION at law to recover damages for the death of Willis King, who was struck at a highway crossing on defendant's line of road by a passing train, and instantly killed. Fuhrman was the engineer on the engine drawing the train, and he was made a party defendant. Defendants filed separate answers, and on the issues joined by the pleadings the case was tried to a jury, resulting in a verdict for plaintiff in the sum of \$8,170.00 against both defendants, which the trial court reduced to the sum of \$6,170.00, and for the latter amount rendered judgment. Defendants appeal.—*Affirmed.*

Tinley, Mitchell & Pryor, Helsell & Helsell, Blewett Lee and W. S. Horton, for appellants.

John P. Organ, for appellee.

DEEMER, J.—Plaintiff's intestate, Willis King, was killed at a railway crossing of the Illinois Central Railroad, at a point between the towns of Clara and Ascott, in Pottawattamie County, Iowa, about five o'clock in the afternoon or evening of December 23, 1913. He was traveling in a top buggy drawn by a single horse, and with him was a young lady something over fifteen years of age. Deceased had started about seven o'clock in the morning of the day he was killed from the town of Blencoe, something like fifty-five miles from the place of the accident, to go to the town of Crescent to spend the holidays with his mother and a little son, who lived near the latter town. They arrived at the town of California Junction about noon, and were proceeding leisurely on their way and, generally speaking, in a southerly direction, until they got into Pottawattamie County where they were compelled to take a highway running a little north of east, which crossed defendant's right of way at approximately right angles.

This crossing was from one-half to three-quarters of a

mile from where the highway turned east from its generally north and south course, and as the railroad track was upon a grade or slight embankment it was visible for half a mile as one drove east upon the road. There was a little snow upon the ground, and there was a mild wind from the north, but it was not unusually cold for that time of year. The side curtains of the single-seated buggy were on, and they were buttoned down, but the front was entirely open. There were several robes in the buggy, and each of the occupants had wrapped himself with the robes and in addition each had on winter wraps, but neither had his or her ears covered, although deceased had on a cap provided with fur ear tips, which were not down.

The horse had been walking slowly as they approached the crossing and did not increase his gait until just before a passenger train on defendant's road struck the vehicle near the front end thereof, and apparently between the horse and the vehicle, knocking both from the track, the horse to one side of the track and the vehicle and its occupants to the other. The train which did the damage was a passenger train coming from the south, and it was running at the rate of approximately fifty miles an hour when the fireman discovered the horse and gave the engineer the alarm. The train which caused the accident ran some distance beyond the crossing before it was stopped, the witnesses differing widely in their testimony as to the distance; and when King was picked up after the collision it was found that he was dead. Defendant Fuhrman was the engineer in charge of the train.

The allegations of negligence upon which the case was submitted to the jury were in substance: (1) Failure of the defendant company and its engineer to give the usual, customary and statutory crossing signals; (2) failure to give other signals and warnings of the approach of the train or to slacken the speed of the train for the crossing, by reason of the dangerous character thereof, due to the growth of weeds

1. APPEAL AND
ERROR: in-
structions:
presumption
that jury
obeyed.

and brush upon defendant's right of way to the south and west of the crossing, in such a manner as to obstruct the view, from a traveler approaching the crossing, of a train coming from the south, and to prevent the engineer in charge of the train from seeing a traveler upon the highway approaching the crossing; (3) in permitting weeds and bushes to grow and remain upon the right of way in such a manner as to obstruct the view of a train coming from the south, and to prevent the engineer from seeing anyone approaching the crossing from the west, upon the highway in question. The defendants denied all negligence, and pleaded contributory negligence on the part of plaintiff's intestate.

The trial court submitted each of these allegations of negligence and specifically stated that:

"If it appears that said whistle was at least twice sharply sounded about thirteen hundred feet from the crossing in question, and the bell thereafter rung continuously until said crossing was passed, it would, in my judgment, be a compliance with the law as to said statutory signals, but if it appears from the evidence by the greater weight thereof that either of said statutory signals was omitted by the defendants, the failure to give such statutory signal would be negligence.

"As before stated, it is for you to say from all of the evidence bearing thereon whether said statutory crossing signals were given or not.

"If they were given, then your verdict must be in favor of the defendant, John Fuhrman, as in my judgment he is not shown by the evidence to be responsible for the other acts of negligence alleged, if such acts are shown in the evidence. If the whistle on the engine was twice sharply sounded where the defendant's whistling post is situated or about thirteen hundred feet south of the crossing in question, and the bell rung continuously thereafter until said crossing was passed, it would, in my judgment, be a sufficient compliance with the statute, and in that event, as before stated, your verdict must

be in favor of the defendant Fuhrman, but if the evidence shows, by the greater weight thereof, that said signals were not given, then both the defendant Fuhrman and the defendant railroad company would be guilty of negligence."

The jury was then told that the other matters of negligence alleged had application only to the railway company, and that if they failed to find negligence of the defendant in either of the respects charged, their verdict should be for the defendants. In other words, the jury was instructed that its verdict might be against both defendants in the event the statutory signals were not given, but that no verdict could be returned against the engineer even though it found the defendant railroad company negligent, unless that negligence was the omission to give the statutory signals. The verdict, as we have seen, was against both defendants. We must assume that the jury followed the instructions and should consider the case from that standpoint. This eliminates one or more doubtful propositions in the case and confines our inquiries to rather narrow fields.

Passing for the moment some rulings on testimony, we go directly to one fundamental proposition argued for the appellant Fuhrman to the effect that the case should not have been submitted and no verdict rendered against him for the reason that no cause of action is stated, and no action will lie against him individually for an instant death caused by his failure to give the statutory signals.

2. RAILROADS :
negligence :
statutory sig-
nals : failure
to give : liabil-
ity of em-
ployees.

As we understand counsel, the proposition here is that the statute creates the liability; that this is of the railroad company, and not of its employee, and that as at common law no recovery would lie for a wrong causing instant death, there can be no recovery here; and certainly no joint recovery for violation of a statutory duty, which statute fixes the liability simply upon the railway company. The statute with reference to the giving of signals reads as follows:

"A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. Any officer or employee of any railway company violating any of the provisions of this section shall be punished by fine not exceeding one hundred dollars for each offense." Code Sec. 2072.

It will be noticed that this section requires the giving of the signals and provides for both civil and criminal liability. The rule which generally obtains in this state is that the violation of a statute is in itself negligence, and that one injured in consequence thereof is entitled to recover, provided he himself is free from contributory negligence. As a rule it is no defense for one to show that his act or omission was while acting as agent or servant for another. As we view it the question here is not one of survival of actions or of providing a remedy for instant death, but rather whether the statute creates any civil liability on the part of the servant or employee guilty of the act or omission, and if not, whether any such liability would have existed at common law. Under our statutes all causes of action survive, and may be brought notwithstanding the death of the person entitled to the same; and the right of civil remedy is not merged in a public offense. Code Secs. 3443 and 3444.

Code Sec. 3445 also provides: "Any action contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to

have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived. . . .”

Under these sections it has many times been held that, although the death be instant, nevertheless there is a right of action for the death which may be enforced by the representative of the deceased. *Connors v. R. R.*, 71 Iowa 490; *Worden v. H. & S. R. R.*, 72 Iowa 201; *Donaldson v. R. R.*, 18 Iowa 280; *Flynn v. R. R.*, 159 Iowa 571.

So that the fact that King died instantly has no bearing upon the ultimate liability of the engineer. No question is made regarding misjoinder of parties, and as we understand defendant's contention here, it is that under the statute the engineer, although he violated the statute in question, cannot be held liable for the resulting damages, notwithstanding an express requirement that he give the signals.

As already suggested, it is the general rule that everyone who commits an unlawful act, injurious to another, is civilly liable therefor and cannot escape because he was an agent or servant of another. *Mechem on Agency*, Sec. 571; *Blue v. Briggs*, 39 N. E. 885.

The question of the joint and several liability of a railway company and its engineer, in running a train over a crossing without giving the usual and customary signals, is considered in many recent cases of the Supreme Court of the United States, and it is uniformly held that where the railway company is held liable because of the failure of its servant to perform a duty, whether that duty be imposed by the common law or in virtue of a statute enacted for the safety of travelers upon a highway, who are subject to the dangers from a railway crossing, both the company and the employee are liable, and may be joined as parties defendant. *Alabama Ry. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161; *Chesapeake Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67; *C. N. O. & T. P. R. R. v. Bohon*, 26 Sup. Ct. Rep. 166.

See also: *Mayberry v. N. P. R. R.*, 110 N. W. (Minn.) 356; *I. C. R. R. v. Coley*, 89 S. W. 234; *S. R. R. v. Grizzle*, 53 S. E. 244.

The statute in question does not create a new cause of action; for the defendant company and its servants and employees in charge of a dangerous machine, even without the statute, were required to exercise reasonable care on the approach of a train to a highway crossing; and the statute simply provides a rule of evidence regarding what shall be considered negligence as a matter of law. In other words, some signal was or might be required without the statute, and the statute merely provides what the nature of the signal shall be. This statute was obligatory upon the defendant's servants, and if they failed to observe it they, as well as the company itself, were liable for any damages resulting therefrom; provided the injured party was free from fault.

The liability for failure to exercise care so as to avoid injury was not created by statute; that existed at common law, but the nature of the care required and the signals to be given are defined by statute. The liability grows out of the fault of the agent, and he is responsible therefor without any statute expressly so declaring, unless it appears that the legislature expressly exempted him from liability, and such exemption should not arise from mere inference. As already suggested, we do not appreciate the force of the argument that, as there was no liability at common law for the tortious act of a servant causing instant death, there can be none under a statute creating a liability for the wrong unless the statute defining the wrong so declares. The statutes creating liability for death are broad and comprehensive, and relate not only to injuries in which the party survives for an appreciable length of time, but also to those resulting in instant death; and, as suggested in the *Donaldson* case, *supra*, a statute imposing liability upon a corporation either civilly or criminally

3. RAILROADS :
negligence
per se: viola-
tion of statu-
tory duty.

does not exempt the immediate agent in doing the wrong from original or concurrent liability.

The fact that the statute imposes a criminal liability upon the servant for failure to give the signals is no reason for absolving him from civil liability; for under our holdings the violation of such a statute is in itself negligence.

II. It is argued somewhat strenuously that there is no testimony to support the allegations of negligence due to defendant's failure to give the statutory signals; that such as there is in the record is merely negative in character, which is more than met by positive testimony that these signals were given. The difficulty here lies in the premise that the plaintiff's testimony was negative in character. There is affirmative testimony that such signals were not given, and the ultimate question was one of fact for a jury upon contradictory testimony. *Hoffard v. R. R.*, 138 Iowa 543, and cases cited.

III. Counsel confidently argue that under the record, deceased should be held guilty of contributory negligence as a matter of law. The difficulty with this contention is that

4. RAILROADS:
negligence;
contributory:
facts not
showing.

the argument ignores certain facts shown by the testimony to the effect that both deceased and his companion looked and listened for approaching trains at a point where ordinary care dictated that they should have looked, and that by reason of the nature of the crossing, the growth of weeds and brush obstructing the view of a train approaching from the south, it was practically impossible to see a train more than 200 feet away, except when a horse driven to a vehicle would practically be upon the west rail of the track; that no signals were given of the approach of the train; that the horse was traveling at a slow walk, and the buggy was making no noise; that the train was running at a high rate of speed and gave no signals whatever of its approach, and no warning until there was no opportunity for plaintiff to escape; that the train was not seen by either of the occupants of the buggy until the engine was nearly upon them; that the nature of the crossing

was such as to mislead one approaching it into the belief that he could see a train approaching from either direction, whereas by reason of the weeds and brush growing upon the right of way he could not see it at all at any reasonable distance from the tracks; these and other facts made the question of contributory negligence one of fact for the jury, and its finding must be accepted as correct for the purposes of this appeal. *Artz v. R. R.*, 34 Iowa 153; *Case v. R. R.*, 147 Iowa 747; *Willfong v. R. R.*, 116 Iowa 548; *Hartman v. R. R.*, 132 Iowa 582; *Gray v. R. R.*, 143 Iowa 268; *Guggenheim v. R. R.*, 33 N. W. (Mich.) 161.

IV. The following instruction is complained of: "If the plaintiff is entitled to recover, the measure of his recovery for the death of Willis King is such sum as will fully compensate

5. DEATH: damages: measure of: present value.	the estate of Willis King for the pecuniary loss to said estate caused by his death. There is no exact rule of law by which such damage can be precisely measured. It must be left largely to your good judgment and common sense.
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"In measuring the damages for the death of Willis King, if any are awarded by you, you should take into consideration so far as shown by the evidence his age at the time of his death, his health and strength, the probable length of life that was before him, the business he was engaged in, his habits as to sobriety and industry, and, so far as can be gathered from the evidence his earning capacity at the time of his death, and fix such fair sum as being now paid in a lump, and being freed from all of the contingencies and uncertainties that inhere in human life, will fairly compensate the estate of Willis King for what the estate has been deprived of in the way of accumulations *that the deceased might have made had he lived.*

"That is, it would be such a sum as being paid now, would be the fair present worth of what Willis King, had he lived, would probably have saved from his earnings, to his estate during his life, so far as said matter can be gathered from the evidence."

This is said to be erroneous because of the underscored words, and *Ford v. Des Moines*, 106 Iowa 94; *Williams v. Clarke Co.*, 143 Iowa 329; *Escher v. Carroll Co.*, 159 Iowa 627, are relied upon. These cases are not in point as an examination will show. The case is ruled by *Hammer v. Janowitz*, 131 Iowa 20, wherein it is held that the instruction is not subject to the objections made. What one whose life has been prematurely taken might have saved, had he lived, is the test given by all the books and means no less than what he would probably have saved. It has reference primarily to ability or power, and not to amount. The amount was to be found by the jury from the circumstances recited in the instruction, and the burden was properly placed upon the plaintiff of showing the amount.

V. Certain rulings on testimony are complained of. We do not set them out, for nothing would be gained from a discussion thereof. Suffice it to say, we see no error.

VI. The trial court instructed that if the jury found the defendant allowed weeds and brush to grow upon its right of way, as claimed by plaintiff, so as to obstruct the view of

an approaching train, this would constitute negligence *per se*; and if this was the proximate cause of the injury, and deceased did not contribute thereto by any negligence on his part, the defendant railway company and the defendant company alone would be liable. This instruction is vigorously assailed. The proposition presented in argument is by no means free from doubt, and the authorities are conflicting. See Thompson on Negligence, Vol. 2, 2d Ed., Secs. 1506, 1507 and 1508; *Indianapolis Ry. v. Smith*, 78 Ill. 112; *C. R. I. & P. R. Co. v. Williams*, 43 Pac. 246; *Moberly v. R. R.*, 17 Mo. App. 518; *Nashville R. R. v. Witherspoon*, 78 S. W. 1052; *Cowles v. R. R.*, 66 Atl. 1020; *Richardson v. R. R.*, 45 N. Y. 846; *Beigsiegel v. R. R.*, 40 N. Y. 9, 12; *Mackay v. R. R.*, 35 N. Y. 75.

We do not find it necessary to review these cases, or to

make any intimation as to what the rule should be in this jurisdiction. The verdict was based upon the defendant's failure to give the statutory signals, and no matter if the instruction complained of was erroneous, the error was without prejudice; for liability was predicated upon the other ground, and defendant is not entitled to a reversal for any error not inhering in that finding. Other questions are moot ones, and it will be time enough to decide them when the necessity arises.

VII. Lastly, it is insisted that the judgment as rendered was excessive. The trial court reduced the verdict from \$8,170.00 to \$6,170.00, the one hundred and seventy in each case being for the loss of the horse and the destruction of the buggy and harness. As so reduced, we do not think we are justified in ordering a further reduction. The deceased was a farmer, twenty-six years of age, sound of mind and body, industrious and of good habits, and getting the ordinary farm wages of \$35.00 to \$40.00 a month with board. He had saved enough to buy the horse and buggy and harness, and a town lot. What he might have earned and saved had he lived his full expectancy was, of course, somewhat problematical; but we do not think the judgment as finally rendered should be further reduced.

Finding no prejudicial error, the judgment must be, and it is—*Affirmed*.

LADD, C. J., GAYNOR and WITHROW, JJ., concur.

GEORGE H. MITCHELL et al., Appellees, v. CHARLES CITY
WESTERN RAILWAY et al., Appellants.

TAXATION: Statutes—Tax Aid to Railways—Strict Construction.

- 1 A statute authorizing the voting and levy of a tax in aid of the construction of an electric railroad is in derogation of the common law and is to be most strongly construed against the railway company.

TAXATION: Railroad Aid Tax—Formation of District—Delegation

- 2 of Power. The legislature may delegate to other bodies or persons the power to fix the limits of the taxing district wherein it is proposed to vote a tax in aid of a railroad. In the absence of fraud or gross abuse of discretion such district will not be disturbed by the courts.

PRINCIPLE APPLIED: Chap. 169, Acts 35 G. A. (Secs. 2091-b to 2091-f, Sup. Code, 1913), provides for voting tax aid in favor of electric railways. An election is secured by the filing of a petition before the board of supervisors, signed by a majority of the resident freehold taxpayers of "any definitely described district or territory contiguous to and within five miles of the proposed railroad." The district in question as described in the petition was not co-extensive with the five-mile limit, but ran in an irregular line on each side of the proposed line of railway in such a way as not to divide sections. A portion of land adjacent to the line, at one end of the road, was omitted from the district. The board, in effect, approved this petition. Fraud was not charged but it was objected (a) that the district was arbitrarily formed, (b) did not include all the land benefited, and (c) that benefits were not graded. Objections overruled.

TAXATION: Tax Aid to Railway—Constitutionality. The statute
3 (Secs. 2091-b to 2091-f, Sup. Code, 1913) authorizing the voting of a tax in aid of electric railways is constitutional.

TAXATION: Tax Aid to Railways—Grading Tax—Power of Leg-
4 **islature.** The legislature may constitutionally authorize the levy of a tax in aid of a railway without requiring all the lands benefited to be included in the taxing district and without grading such tax according to benefits.

TAXATION: Tax Aid to Railways—Statutory Requirements Exclusive. The statutory requirements as to what shall be done in order to legally vote a tax under Sec. 2091-b, Sup. Code, 1913, in aid of a railway are exclusive of all other requirements.

ELECTIONS: Special Propositions—Submission of—Form of Ballot
 6 **—Duality—Taxation.** Two distinct "objects" must not be so intermingled in a proposition submitted at an election that the voter is unable to freely express his choice on one without reference to the other. The proposition must be confined to one general related scheme. But the "object" is of the essence of the proposition. There is no duality unless the proposition involves purposes which cannot naturally and reasonably be said to be a part of one general plan or scheme.

PRINCIPLE APPLIED: Proceeding to vote a tax under Ch. 169, Acts 35 G. A. (Secs. 2091-b to 2091-f, Sup. Code, 1913). The petition for the election, the notices of election and the form of the ballots embraced the proposal to vote the tax (a) in aid of the *electrification* of a line of steam railway already owned and operated by the company from Marble Rock in Floyd county to Charles City in the same county, a distance of thirteen miles, and (b) in aid of the *construction* by the same company of an electric railway from the point where the old steam railway ended in Charles City to a point some ten miles northeasterly in said county. The manifest purpose was that the entire line of 23 miles should constitute an electrical line. *Held*, the proposition (a) "to electrify" the old steam line and (b) "to construct" the electrical extension constituted only one general related scheme and was, therefore, not subject to the vice of duality.

WORDS AND PHRASES: Conjunctive and Disjunctive Terms.
 7 "Or" may be read "and" if the context justifies such interpretation.

PRINCIPLE APPLIED: Sec. 2091-b, Sup. Code, 1913, provides in substance that taxes may be levied "to aid in the construction of a projected electric railroad *or* in the electrification of a steam railroad." *Held*, "or" might be read as "and."

Appeal from Floyd District Court.—HON. M. F. EDWARDS,
 Judge.

TUESDAY, SEPTEMBER 29, 1914.

REHEARING DENIED TUESDAY, FEBRUARY 23, 1915.

SUIT in equity to enjoin the levy and collection of a tax voted in aid of the electrification and construction of an inter-urban or trolley line of railway, from Marble Rock into and through Charles City, and on in a northeasterly direction some nine or ten miles to the county line. The trial court granted the prayer of the petition, and defendants appeal.—*Reversed.*

Edwards, Longley & Ransier, John P. Gregg and C. S. Moore, for appellants.

Senneff, Bliss & Witwer, Dunn & Bryant, W. H. Salisbury and H. J. Fitzgerald, for appellees.

DEEMER, J.—Prior to the happening of the matters complained of, the Charles City Western Railway owned and operated a steam railway from Marble Rock to Charles City, a distance of approximately 13 miles, and in the fall of the year 1913, it concluded to electrify this line, and to extend its road northeasterly from Charles City some nine or ten miles to the county line. Desirous of obtaining aid by taxation for the making of these improvements, it secured and presented a petition to the board of supervisors, to submit the matter to a vote of the residents of a district created by the petitioners. Finding the petition sufficient in form and substance, the board of supervisors called an election by the residents and prepared a ballot for the election formulated from the petition, and at the election called for the purpose the proposition was declared carried, and the board was about to certify the tax when plaintiffs, who are resident landowners and taxpayers within the district, commenced this action to enjoin the levy and collection of the tax.

The propositions relied upon to defeat the tax are something like sixteen in number; but they revolve around a few central propositions which may be stated as follows:

(a) The petition for the tax and the proposition stated in the ballots was not a single one, but dual in character, and

so worded that an elector would have to vote for or against both, although he might have desired to vote affirmatively on one and negatively on the other.

(b) The propositions themselves were uncertain and insufficient in that they did not state the amount of money required for electrifying the old road and for the construction of the new line.

(c) The propositions were inadequate and insufficient in that they did not state what part of the new line should be constructed and what part of the old electrified before the tax was collected.

(d) The legislature had no power to authorize the establishment of taxing districts for voting aid to steam or inter-urban railways.

(e) The property in the proposed district was not classified according to benefits, and the tax was not uniform or according to benefits received.

(f) Not all the property benefited was included within the district.

(g) The provisions of 35 G. A., Ch. 169, if construed as contended for by appellants, are unconstitutional and void.

Appellees' first contention in support of the decree of the trial court is that, as the statutes under which the proceedings were instituted are in derogation of the common law, and impose a tax upon property owners, or some of them, without their consent, they are to be construed most strongly against the railway company. This contention is sound, of course, and the rule will not be lost sight of during the course of this opinion.

As the statute under which the defendant proceeded is new, and has never received a construction by this court, we quote therefrom as follows:

"Sec. 1. Taxes not exceeding five per cent on the assessed value of the real property of any district or territory contigu-

1. TAXATION:
statutes: tax
aid to rail-
ways: strict
construction.

ous to any projected trolley or electric railroad, or to any steam railroad which it is proposed to electrify, may be levied to aid in the construction of such projected trolley or electric railroad, or in the electrification of such steam railroad, within the state, as hereinafter provided.

"Sec. 2. When it is proposed to construct any trolley or electric railroad, or to electrify any steam railroad, and a petition definitely describing any district or territory contiguous to and within five miles of the line of such railroad or proposed railroad, signed by a majority of the resident freehold taxpayers, of such district or territory, asking that the question of aiding in the construction or electrification of such railroad or proposed railroad within such district or territory, be submitted to the voters thereof, is presented to the board of supervisors of the county in which such district or territory is situated, it shall be the duty of such board of supervisors immediately to give notice of a special election by publication in some newspaper published in such district or territory, if any there be, and if not, then in some newspaper published in the county, and also by posting copies of said notices in five public places in such district or territory at least ten days before such election, which shall state the time and place of holding the same, the name of the company and the line of the road proposed to be added, the rate per cent of the tax to be levied; whether one-half thereof shall be collected the first year and one-half the following year, or whether the whole is to be collected in one year, the amount of work required to be done, and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due, and in no case shall such tax become due until such railroad is fully completed according to the conditions of said notice. The board of supervisors shall cause to be prepared the form of the proposition to be submitted, and the proposition shall be printed and placed upon the ballots, and the board of supervisors

shall appoint the judges and clerks of election, and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections, and the judges of election shall canvass the vote and make return to the county auditor, and if a majority of the votes polled be for the adoption of the proposition, then the county auditor shall forthwith certify to the result thereof, rate per cent of the tax voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same when collected is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds. The expense thereof and of publishing the notice and all the expenses of the election shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded the board of supervisors of the county shall at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which shall accompany the tax list. The taxes shall be collected at the time or times specified in the order and in the same manner and subject to the same laws after they are collectible as other taxes, or as may be stated in the petition and notice for the election, except as otherwise provided; provided however, that such tax shall only be levied upon the real property within such district or territory. The stipulations and conditions in the notice prescribed in this section must conform to those set forth in the petition asking for the election, and the aggregate amount of taxes

voted in any such district or territory shall not exceed five per cent of the assessed value of the real property therein.

"Sec. 3. The provisions of Secs. 2087, 2090 and 2091 of the supplement to the code, 1907, are hereby made applicable to all taxes levied under the provisions of this act."

The petition presented to the board was in substance as follows:

"To the Board of Supervisors of the County of Floyd, State of Iowa: The undersigned petitioners representing a majority of the resident freehold taxpayers of that certain District lying wholly within Floyd County, Iowa, and hereinafter definitely described, do hereby respectfully petition your Honorable Body that you cause to be submitted to the voters of said District the question of voting a tax of five per centum on the assessed value of all the real property within said District for the purpose of aiding in the electrifying by the Charles City Western Railway Company of that portion of its present line of railroad extending from the west line of Section 2, Township 94, Range 17, West of the 5th P. M. a point near Marble Rock, in said County, northeasterly to and within the City of Charles City, in said county, and the construction by said Charles City Western Railway Company of a trolley or electric railroad from its present terminus in said City of Charles City, northeasterly to a connection with the Chicago Great Western Railway, all as provided by Chapter 169, of the laws of the 35th General Assembly of Iowa, entitled, 'An Act to enable benefited property to aid in the construction of trolley or electric railroads or the electrification of steam railroads, being additional to Chapter 5 of Title 10 of the Code as amended.'

"It is provided that the aid to be voted for is on the express condition that no part of said money shall be drawn from the treasury by said Charles City Western Railway Company until said described portion of its present steam line of railroad is fully electrified, and said proposed trolley

or electric railroad fully completed northeasterly from Charles City to a point near the center of the north line of Section 32, Township 96, Range 15, West of the 5th P. M., in said county, when one-half of the said tax shall be paid to said Company as soon as same may be legally collected, and the last half of said tax shall become due and payable when said trolley or electric railroad shall be fully completed northerly and northeasterly from said north line of Section 32 via Niles to and across the Little Cedar River to a point near the northeast corner of Section 10, Township 96, Range 15, West of the 5th P. M., in said County, and within the District hereinafter described, and on the further express condition that the first part of said work, required to be done, shall be completed by the first day of July, 1915, and said last part of said work, required to be done, shall be fully completed by November 1st, 1915.

“The district above referred to and within which you are requested to submit to the voters thereof the question hereinbefore mentioned shall be that District definitely described as: (here follows the description of the lands). All of which District lies wholly within Floyd County, Iowa, and contiguous to and within five miles of the line of railroad or proposed railroad which it is hereby proposed to aid.”

The board made an order granting the petition and ordering an election, and also gave notice of an election which included a copy of the petition in *haec verba*. At the election the following form of ballot was prepared by the board and used by the electors:

OFFICIAL TAX PROPOSITION BALLOT.

Special Election, January 3, 1914.

NOTICE TO VOTERS. For an affirmative vote upon any question submitted upon this ballot, mark a cross (X) mark in the square after the word “YES.”

For a negative vote make a similar mark in the square following the word “NO.”

SHALL THE FOLLOWING PROPOSITION BE
ADOPTED?

Shall a tax of five per cent (5 per cent) on the assessed value of the real property of that certain district definitely described in the petition referred to and set out in the notice of this special election, be levied to aid in the construction of the projected trolley or electric railroad projected by the Charles City Western Railway Company, a corporation organized under the laws of the State of Iowa, and to aid in the electrification of the portion of the line of steam railroad of said Charles City Western Railway Company, situated in said district, being the same projected trolley or electric railroad and the same portion of the line of steam railroad of said Railway Company referred to and specified in said notice of election, said tax to be collected at the time or times therein specified, and to become due and payable to said Railway Company at the time or times and upon the conditions as specified in said notice.

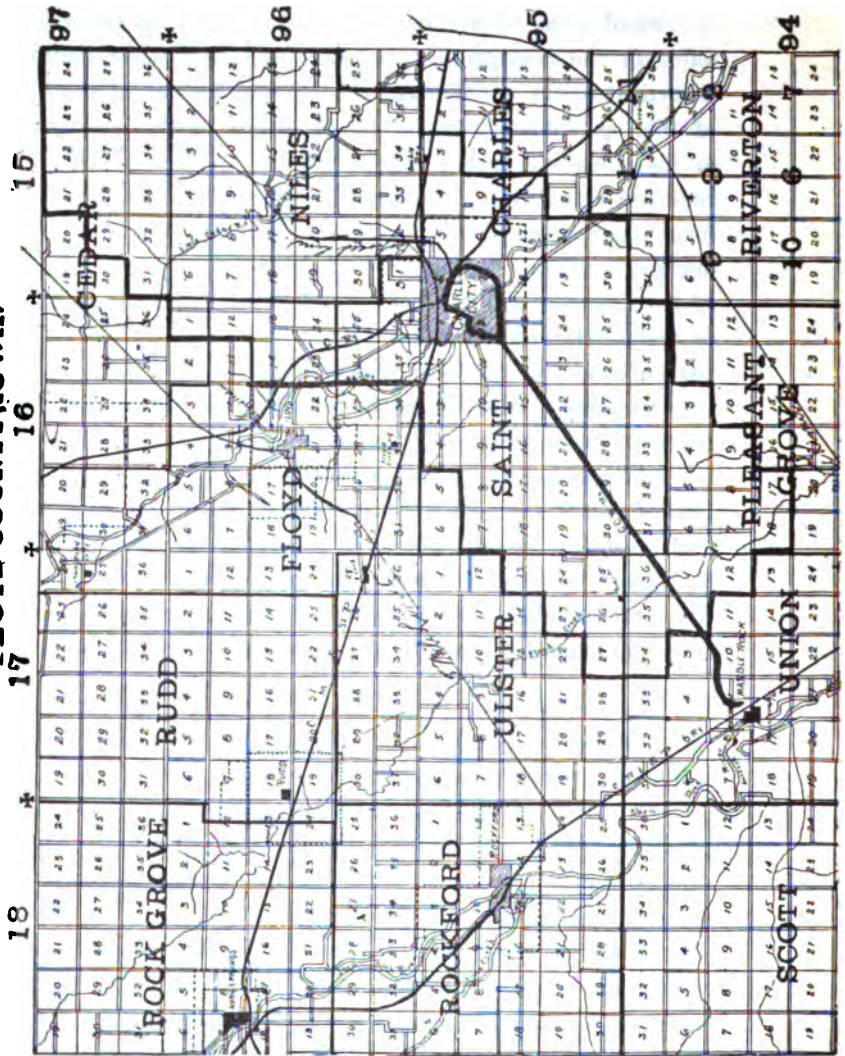
YES
NO

An election was held; thereat 1,233 votes were cast in favor of the proposition, and 877 against, a majority of 356 being in favor of the tax.

The district as formulated by the petitions and as approved by the board is shown by the attached plat. This plat also shows the old line of road and the part to be newly constructed. It also shows the five-mile limit.

It will be observed that the district lines do not correspond with the five-mile limit, and that some of the land adjacent to the old line of road is not included within the district. There is no charge of fraud in the petition, but it is asserted that the district was arbitrarily formed, that it does not include all the land benefited, and that there is no gradation of benefits.

FLOYD COUNTY, IOWA.



The only testimony regarding the reason for shaping the district so as to exclude Marble Rock and some immediate territory, was as follows:

"We had a good reason why we did not want to take in the town of Marble Rock; it was not because we thought, if we did, that it would not carry, that was not the reason. . . . The reason for stopping the taxing district two miles this side of Marble Rock was that the people of Marble Rock were interested in having the road extended further Southwest, which had been discussed considerable, and for the reason that with such an extension a new taxing district would be laid out including Marble Rock and the vote for the Southwest. And, therefore, this taxing district was stopped two miles from Marble Rock with the understanding that when it came to the extension of the road to the Southwest, this would be a new taxing district, in which they would be included. We did not want to include them in both, and as I understand, we could not if we did want to, within ten years."

It will be observed that the legislature did not definitely fix the district to be affected by the tax, and this of necessity was left either to the petitioners or to the board of supervisors, or to the petitioners with the consent and approval of the board; the only limitation being that the property shall be contiguous to and within five miles of the line of road or proposed road.

The tax is in aid of a public improvement,—a railway or interurban railway being treated as a highway, specially benefiting those within the sphere of its usefulness,—and all such property within the proposed district is regarded as specially benefited and, under certain conditions, liable to the tax. It is perfectly legitimate for the legislature to fix taxing districts or to delegate this power to other bodies or persons, and in the absence of fraud or gross abuse of discretion, such

2. TAXATION:
railroad aid
tax: forma-
tion of dis-
trict: delega-
tion of power.

districts will not be disturbed by the courts. There is no claim of fraud here, and nothing but the bare fact that some property supposed to be benefited and other property not benefited at all or differently benefited from other lands is included, is relied upon to defeat the tax. Many reasons might be suggested for not including all within the five-mile limit. As the road runs obliquely through the county, it is manifest that an absolute five-mile limit would be wholly impracticable, for it would divide up much of the land into small, irregular tracts, and impose great burdens in the levy and collection of the tax.

Moreover, as the tax is a flat one, not graduated according to benefits, it is difficult to see how plaintiffs were prejudiced by the fact that not all within the five-mile limit was included. The explanation given for not including some of the property near Marble Rock is not contradicted, and if it were, but one other possible motive can be suggested, and that is that as the owners of the omitted lands near Marble Rock had adequate facilities they would vote against the proposed tax and might thus kill the whole project. This suggestion is two-edged. If they were in fact not benefited and so would be led to vote against the entire proposition, then they should not, on appellees' theory, have been included for the reason that they received no benefit from the project. Furthermore, it is difficult to see how the plaintiffs were prejudiced by the non-inclusion unless on the theory that the votes of the owners of these lands would have been against the tax proposition and if included they would have converted a majority into a minority.

8. TAXATION: tax
aid to rail-
way: constitu-
tionality.

There is nothing in appellees' claim that the law is unconstitutional. It is uniform in its operation, and the tax need not be a graduated one. *C. B. & Q. R. R. v. Iowa*, 94 U. S. 155; *Stewart v. Board*, 30 Iowa 9.

The presumption is that the district was properly formed, and as a rule the action of a body properly authorized to create an assessment district is conclusive in the absence of

a showing of fraud or mistake. *Powers v. City of Grand Rapids*, 57 N. W. (Mich.) 250; *Sanitary Dist. of Chicago v. Joliet*, 59 N. E. 566.

The law is not unconstitutional and no good reason is shown why the tax should be disturbed because of the nature of the district created by the petition and approved by the board of supervisors. The law does not require a graduated tax, and the legislature may establish the outside limits of such a proposed taxing district. If appellees' contentions were sound, many works of public improvement would be stopped, and much confusion would be introduced into what has heretofore been regarded as settled law.

The tax is not for the cost of the improvement, but in aid of the establishment of a highway, and the entire burden is not thrown upon those specially benefited. Within the five-mile limit all the lands may be taxed at a flat rate, and this, as it seems to us, is within the power of the legislature.

II. It is argued that the entire proceedings are invalid because nowhere is it stated, in any of the petitions, notices or proceedings, what the cost of electrification would be, and what the cost of construction and electrification of the new piece of road.

Suffice it to say that the law does not require a statement as to the cost of the whole or any part of the improvement. There is no necessity for such a statement, and as none is required by law, courts are not justified in requiring it.

III. The only debatable proposition in the case relates to the sufficiency of the proposition submitted to the electors, and to the form of the ballot for their use. It is strenuously and earnestly contended that the petition for the tax, the notice to the electors and the ballot used at the election, contain dual propositions, and that it was impossible for the electors to vote for one and against the other, or to in any manner express themselves save for or against

4. TAXATION: tax aid to rail-ways: gradu-ating tax: power of legis-lature.

5. TAXATION: tax aid to rail-ways: statu-tory require-ments ex-clusive.

6. ELECTIONS: special propo-sitions: sub-mission of: form of bal-lot: duality: taxation.

both propositions, to wit, the electrification of the old steam line from Marble Rock to Charles City, and the construction of a new line from Charles City in a northeasterly direction some nine or ten miles, and that the result was not and could not be a fair expression from the people concerned. On the other hand it is asserted with quite as much confidence that there was but one object to be attained in the proposition submitted, and that was the construction, equipment and operation of but a single line of electric railway, from Marble Rock through Charles City, northeasterly to the county line, some nine or ten miles, to be owned, operated and maintained by one company without break, and probably extended in both directions if circumstances warranted.

It is admitted, of course, that the old steam railway was to be used as a part of the line, and was to be converted into a part of the electric line, but it is contended that this did not make the proposition a double one for the reason that but a single object was contemplated. But for these contentions on behalf of the respective parties, the case doubtless would not be before us and the question is not easy of solution. Authorities apparently supporting either proposition are cited; and some reliance is placed on the terms of the statute which says that the tax may be voted for the construction of a trolley or electric railroad *or* to electrify a steam railway. Great reliance is placed upon the disjunctive *or*. But to our minds this is not controlling. Of course, either may be submitted, but it does not follow from the language of the statute that both may not be submitted where it is proposed to electrify part of a steam road already constructed and to construct another piece of electric railway to be operated as a part of one system and in conjunction with it.

7. WORDS AND PHRASES: conjunctive and disjunctive terms.

The use of a disjunctive word in a statute does not imply that the conjunctive was not intended. *Barker v. Esty*, 19 Vt. 131; *Winterfield v. Stauss*, 24 Wis. 394; *Sparrow v. College*, 77 N. C. 35; *Rigoney v. Neiman*, 73 Smith (Pa.) 330.

This is the rule even in criminal cases: *State v. Smith*, 46 Iowa 670; *State v. Brandt*, 41 Iowa 593; *State v. Meyers*, 10 Iowa 448. So that the use of the word "or" is not in itself determinative of the proposition here involved.

Of course if the roads were separate and independent propositions, and it was not intended to make a single electric line, appellees' contention would be sound. But according to the weight of authority and sound reason, if but a single road, electric or trolley line is contemplated, the fact that it involved the conversion of an old steam road by electrification into a part of the system does not make the proposition dual in character. If, for any reason, parties within the district served by the old line did not care to have it become a part of a system of electric road extending some nine or ten miles beyond the terminus of the old line, or did not wish to have it *electrified* at all, it was within their power to so express themselves by voting against the entire proposition; and in the same manner those living in proximity to the line to be newly constructed could indicate their choice. Unless the proposition involves incongruous purposes which cannot naturally and reasonably be said to be a part of one general plan or scheme, there cannot be said to be such a blending of the two as that they must be submitted separately. *Coleman v. Eutaw*, 157 Ala. 327, 47 So. 703; *Kemp v. Hazelhurst*, 31 So. (Miss.) 908; *Cary v. Blodgett*, 102 Pac. (Cal.) 668; *Seymour v. Tacoma*, 32 Pac. (Wash.) 1077; *Oakland v. Thompson*, 91 Pac. (Cal.) 387; *Lain v. Omaha*, 107 N. W. (Neb.) 983; *L. & N. Ry. v. County*, 62 Am. Dec. (Tenn.) 424.

These cases hold, in effect, that although there may be two parts of a proposition, if such parts make one connected whole, the scheme is not a dual one. For example, in one of the cases, a proposition to build a fire engine house in one part of a city, and another in a different part upon a lot to be purchased for that purpose, was held not dual in character. *Lain v. Omaha*, *supra*. Again, a proposition to construct two wagon roads was held single in character. *People v. Counts*,

26 Pac. (Cal.) 612. And a proposition to purchase or erect waterworks has been held not dual in character. *Nash v. Council Bluffs*, 174 Fed. 182; *Ryan v. Tuscaloosa*, 46 So. (Ala.) 638; *State v. Allen*, 77 S. W. 868. Although the contrary has also been held. A proposition to build a court-house and jail, if to be all in one building, has generally been held to be a single one. *Hughes v. Horsky*, 122 N. W. (N. D.) 799; *Potter v. Lainhart*, 33 So. (Fla.) 251; *Louisville v. Park Com.*, 65 S. W. (Ky.) 860. And one court has held that if separate buildings be proposed upon different lots, the proposition is dual in character. *Stern v. Fargo*, 122 N. W. (N. D.) 403. Another court has held that a proposition to acquire several distinct and separate tracts of land for park purposes is but a single scheme. *Oakland v. Thompson*, *supra*. But see *Gray v. Mount*, 45 Iowa 591.

Of course, there must be one general related scheme—one general improvement—else it will be dual in character. But if there be but one object in view, the fact that it involves reconstruction as well as construction does not make the proposition dual. *Coleman v. Eutaw*, *supra*; *State ex rel. Chillicothe v. Wilder*, 98 S. W. 465; *L. & N. Ry. v. County*, 1 Sneed (Tenn.) 637; *Lynch v. R. R.*, 15 N. W. (Wis.) 743; *U. P. R. R. v. County*, 3 Dillon 359; *State v. Allen*, *supra*.

We copy the following from our own cases as illustrative of the doctrine here announced.

In *Rock v. Rinehart*, 88 Iowa 37, the proposition was:

"Shall the board of supervisors . . . contract for the erection of a courthouse . . . at a cost not to exceed the sum of fifty thousand dollars, from the proceeds arising from the sale of the lands belonging to said county, lying in the counties of Ida and Cherokee.

"The appellants contend that two separate and distinct propositions are contained in this ballot, so joined that a vote for one necessarily resulted in a vote for the other, namely: 'Shall the board of supervisors of Iowa County be authorized

to order and contract for the erection of a courthouse at Marengo, the county seat of said county, at a cost of not to exceed the sum of fifty thousand dollars?' 'Shall the swamp land fund belonging to Iowa county be devoted wholly to the construction of a courthouse at Marengo, in Iowa County?' Elections like this are governed by the same rules that apply to the election of officers. In canvassing the vote the intention of the voters must be ascertained from their ballots. The language of the ballot is to be construed in the light of facts connected with the election. *Hawes v. Miller*, 56 Iowa 395, 396. The appellants cite and rely upon *McMillan v. Lee Co.*, 3 Iowa 311, and *Gray v. Mount*, 45 Iowa 591. In the case of *McMillan v. Lee Co.*, the proposition submitted to be voted on at the same time was whether or not the county would subscribe to the capital stock of three different railroad companies, one hundred fifty thousand dollars in each, with a provision as follows: 'That the said subscription shall not be made to either of said companies unless the vote shall be carried in favor of each and all of them.' While it is intimated that the three propositions might have been submitted at the same time in such a manner as to be voted upon separately, it is held that under the clause last quoted no single question was submitted, but the fate of each proposition was made to depend upon the result of all three. Thus combined, the voter who favored one or two of the propositions, and opposed the others, could not vote his sentiments. He must vote for or against all. The vice in such a submission is that by thus joining different propositions a popular and desirable proposition may be made to carry one that is not desired; or an undesirable measure to defeat one that is desirable. In *Gray v. Mount* the proposition submitted was: 'Shall the swamp-land of Guthrie County, Iowa, be devoted by the board of supervisors of said county to the erection of a courthouse at Guthrie Center, in said county, and a county high school in the town of Panora, in said county, in the proportion of two-thirds thereof to the erection of said courthouse and one-

third to the erection of said county high school building?' In passing upon the legality of this proposition this court held that the object is of the essence of the proposition; that the appropriation for a given object is the proposition submitted; that, if there are two objects, there are two propositions, and if submitted together, the voter cannot vote for one, and against the other. *Supervisors, etc. v. Mississippi & W. Ry. Co.*, 21 Ill. 338, 373, and other Illinois cases following it, are also cited by appellants. In those cases, as in *McMillan v. Lee Co.*, the proposition was in aid of more than one railroad company, and was held bad under their statute. *Lewis v. Commissioners*, 12 Kan. 186, 213, cited, holds that the commissioners could not, by construction, enlarge the authority given by a vote upon a single proposition so as to include another. A careful reading of the ballot under consideration, in the light of facts connected with the election, shows marked distinctions between this and the cases cited. There is but one object—the erection of a courthouse—while in those cases there were two or more. Following *Gray v. Mount, supra*, we must say that, there being but one object, there was but one proposition."

In *Brooks v. The Town of Brooklyn*, 146 Iowa 136, the ballot was:

"Shall the following public measure be adopted, to wit:

"Shall the contracts approved by the town council in relation to the erection of a town hall be adopted, as follows: (Here are set out the contracts).

"The case presents two questions: The first being the sufficiency of the ballot; and the second, the nature of the building which the town proposed to erect. Two contracts were presented to the voters for approval; but the elector, by the form of ballot used, had to vote for or against both contracts. He could not vote for one and against the other, save as he by reason of his objection to one should vote against both. Did this invalidate the election? Because but one

object was sought, viz., the building of a town hall, the question under the rule announced in *Rock v. Rinehart*, 88 Iowa 37, must be answered in the negative. If the voter did not wish to have the town hall erected, he would vote in the negative. If he thought that one of the contracts was bad he would also vote no and as said in *Rock's* case, 'A careful reading of the ballot under consideration, in the light of facts connected with the election, shows marked distinction between this and the cases cited. There is but one object—the erection of a courthouse—while in those cases there were two or more. Following *Gray v. Mount*, *supra* (45 Iowa 591), we must say that, there being but one object, there was but one proposition.' "

This is the rule we now follow.

IV. It was unnecessary, in this view, to state separately the propositions for electrification and for construction and electrification, as there was but one object—the construction, maintenance and operation of a single line of trolley or electric road, from Marble Rock through Charles City and north-eastward nine or ten miles, as already stated. If appellees were correct on their other main proposition they would be correct on this last one; for one depends upon the other. Finding them incorrect on the question of duality, they must be wrong here.

For the reasons stated, the decree must be, and it is—*Reversed*.

All the Justices concur.

STATE OF IOWA, Appellee, v. G. W. BIEWEN, Appellant.

HOMICIDE: Manslaughter—Gross Carelessness—Sufficiency of Evidence. Evidence reviewed and held to sustain a conviction for manslaughter in negligently driving an automobile over a child, both as to the identity of defendant and the acts of negligence.

HOMICIDE: Manslaughter—Legal Intent Supplied by Recklessness
2 —**Instructions.** That element of intent necessary to support manslaughter *inheres* in conduct showing a reckless disregard and indifference to the lives and safety of others, resulting in death. Therefore where the court instructed that such recklessness must be found before conviction could be returned, its further statement that the law presumed an intent to kill from such reckless conduct resulting in death was without any prejudice to defendant.

CRIMINAL LAW: Trial—Argument Outside Record—Sustaining
3 **Objections Thereto—Curing Error.** Sustaining objections to improper argument, and admonition to counsel to keep within the record, with due caution to the jury either orally or generally in the instructions, has large curative effect on such error.

CRIMINAL LAW: Trial—Argument—Allowable Limits—Matters of
4 **Record.** Counsel, even for the state, will be permitted to enter upon and pursue such vigorous exercise of his vocabulary as may seem to him meet in the promotion of his client's cause, even though his ventures into the realm of oratory may take the form of strong denunciation, so long as he confines himself to matters of record and reasonable deductions therefrom. *Held*, counsel's argument was allowable.

Appeal from Keokuk District Court.—HON. K. E. WILLCOCKSON, Judge.

TUESDAY, FEBRUARY 23, 1915.

THE defendant was convicted of manslaughter and appeals.—*Affirmed.*

D. W. Hamilton and *Wagner & Updegraff*, for appellant.

George Cosson, Attorney General, *C. C. Hamilton*, County Attorney, and *Talley & Hamilton*, for appellee.

LADD, J.—In the evening of August 16, 1913, Clarissa Hammes, a child nearly one year and six months old, was run over by an automobile and died in consequence of in-

- juries received, the following morning. Her
1. HOMICIDE: parents lived on the main traveled north and
manslaughter: gross carelessness: sufficiency of evidence. south highway between Harper and Richland.
The mother was the only eyewitness and thus

described what occurred:

“There is a lane between the house lot and the barn lot; she did not go with me in the barn lot, but stopped in the lane. I went to the barn lot to milk. I milked a cup of milk, took it to her, she sat in the lane drinking the milk. After I returned and was milking I saw an automobile coming north. Gus Biewen was in the car alone. I saw a car coming south a few minutes after it went north. I called for my girl and screamed. I saw her in the road right where it turned into our lane. I saw the car strike her, I was screaming at the time. From where I was when I first saw the car, I had gotten about half way to the fence when it struck her. I saw the child in the road at the time this car was going south, saw her when I raised up to look for her. The car bounced when it hit the child. I heard the car honk before it hit the child. I don't know who was in the car. I seen it was a car and that is all. I don't know whether there was two in the car or not, I didn't look. When I picked the child up, she was on the west side of the traveled road. I carried her to the well, threw cold water on her and then took her to the house and called for my husband. . . . She died about four o'clock in the morning of the 17th. She never regained consciousness. The car that came to the north was running pretty fast. I did not notice that it checked up. It was about seven o'clock. It was light. . . . The child had on a blue dress and nothing on its head. There was a dog with the child. A Scotch collie, it was yellow. It was about a year old. When I first looked up the dog was with her. I don't

know where the dog was after that. The dog was not as tall as she was. The dog was not in the habit of running out at cars, he would go out and bark but never followed a car."

Other evidence showed that the child was a head taller than the dog and could run. The highway was clear at the place of the collision and for a distance of 300 yards north and suitable for travel for a width of at least 30 feet. A short distance south the roads crossed and east of the corner a quarter of a mile and then south the same distance was defendant's home. In his service was Lloyd Dubois, living in a house a few rods farther on. The latter had been assisting Bombeis thresh on that day and testified that on his way home, at a point ten rods north of the corners last mentioned, he met defendant going north in his Ford automobile; that "he asked me how soon I would be ready to go down to Ollie. I said as soon as I could get my clothes changed and my team put up. I asked him where he was going. He said he was going up the road a mile or two. I let my team trot along. I went right home to where I lived. When I was unhitching my team, I saw him again standing on the north side of the team. That was the first I saw of him after I got home."

To the north of the place of the collision about a half mile is another road crossing and Bombeis' farm was about a quarter of a mile farther north and a like distance east of these corners. Dubois had left there between 6:30 and 7:00 o'clock P. M. Several parties examined the ground at these corners shortly afterwards and testified to recent car tracks indicating that an automobile coming from the south had turned there and returned to the south and Mrs. Hammes testified that she observed no car other than defendant's go north that evening and but the one going south. Dubois noticed none going either way other than defendant's and testified that he and defendant went to Ollie in the evening; that shortly after their return, defendant said to him that he believed he was in some trouble, that his wife said someone had

run over C. Hammes' little girl, that they said he did it, and that he believed he would go there and wanted Dubois to go with him. They did not go nor did defendant ever go there. On the other hand, one Marr testified that at about the time in question he was driving north with horse and buggy and stopped at a place, probably defendant's, for a drink of water; that when he went he saw an automobile going north and met another going south a half or three quarters of a mile north of Hammes' house and saw none turn in the road. He had never been on this road before and was traveling from Richland to Harper. The defendant's wife testified that he reached home at about six o'clock P. M. and immediately took her and their children for a ride and that they drove past Hammes' house to the second crossroads north when they turned and came back home and that he did not leave again until he went to Ollie in the evening and was at home when Dubois came from Bombeis' place. The defendant testified that in returning from Sigourney he passed the Hammes' home and took the ride as related by his wife; that a man, presumably Marr, called for a drink of water and that he did not pass along that road after taking the ride. He denied meeting Dubois as related by the latter or mentioning trouble to him though admitting the talk about going over to Hammes'.

Such was the evidence set out somewhat in detail because of the contention of counsel that it was insufficient to sustain the conviction. The child was killed by an automobile being driven with an unobstructed view and as there was no obstacle to turning aside so as to avoid the collision, death might well have been found to have been in consequence of the recklessness of the driver. This was true whether the driver observed the child or not, for if he did not see he should have done so in the exercise of ordinary diligence. The slower he was moving in such a situation the greater must have been his carelessness. Counsel suggest that as the child was found

west of the center of the road, the driver's attention may have been distracted by the dog on the east side and the child in following the dog may have run out in front of the car. A sufficient response to this is the mother's testimony that the child was in the road in plain view. Moreover, the driver must have been aware of striking the child, and moving on without stopping or tendering assistance was a circumstance indicative of guilt on his part. The evidence was such that the jury was warranted in finding that the child's death was due to the recklessness of the driver of the automobile and the only remaining issue was the identity of the driver. As to this, the evidence was in conflict, and the arguments are directed to which conclusion is more probable. This was for the jury to determine and their finding that defendant was driving the automobile at the time of the collision has such support as to preclude any interference from this court.

I. In the fifth instruction, the jury was told that the law implied an intent to kill from the reckless and careless acts causing death, "for the law presumes that every sane person intends the natural consequences of his voluntary acts." This may not have been technically accurate when applied to the charge of involuntary manslaughter, for negligence and reckless indifference to the lives and safety of others may supply the intent in that offense for the purposes of the criminal law. *State v. Moore*, 129 Iowa 514.

Other instructions exacted a finding in order to constitute manslaughter that death was caused by such negligence and indifference and this being so, what difference could it make with defendant whether intent were as a matter of law implied therefrom or whether the jury were told it was not essential? Not the slightest, for in either event no finding of fact was involved and the error, if any, was without the slightest prejudice.

II. Exception is taken to the closing argument by W. H. Hamilton to the jury. D. W. Hamilton for defendant had

suggested that counsel for the state would talk about the car Marr saw going south being that of the physician who came from Harper to attend the child and that "the state of Iowa probably knows whether that was a one-seated or a two-seated car,"—Marr having testified that he thought the car he met was two-seated. Counsel for the state responded by quoting the above and then saying:

"Of course the State of Iowa knows that when the lawyers defending a criminal don't know it. The State of Iowa had used Dr. Adrian and sent him home and they knew it, but the State of Iowa has since found out some things and we are very sorry that Dr. Adrian's evidence is not before you on that subject."

Counsel for defendant objected to this "as improper argument and seeking to get matters in testimony that are not testified to." The court promptly sustained the objection and admonished counsel to keep within the record.

Counsel for state remarked that "whenever you touch a fellow in a sore spot he always squeals." An objection to this was sustained. The jury must have understood from the ruling on the objection and the admonition to counsel that such allusion was improper, and they were further guarded by the caution contained in the instructions to take into consideration only the evidence adduced. There was no prejudice.

The record does not show that other passages in argument now complained of were objected to at the time, but if they were these ought not to be held improper argument. The language was strong; but if based on the facts of the case, courts ought not to cavil concerning the selection of words. In the course of argument, counsel for the state exclaimed: "If Gus Biewen ran over that little baby and crushed out its life; if Gus Biewen went on down the road and never stopped

3. CRIMINAL
LAW: trial:
argument out-
side record:
sustaining ob-
jection there-
to: curing
error.

4. CRIMINAL
LAW: trial:
argument:
allowable lim-
its: matters
of record.

to help that screaming mother; if his head is so thick that that did not make any impression upon him at all; if Gus Biewen after he heard of this never went near his neighbor, never expressed a word of sympathy or offered to turn a hand in their behalf; if this is the kind of a man Gus Biewen is, are you going to believe him and disbelieve Lloyd Dubois?" This was not outside of the record but comment on what the evidence tended to prove.

Counsel for defendant had argued to the jury that nothing it could do, no verdict it might return could restore to the parents their little girl, and to this counsel for the state responded: "What does she care, this little mother care, for her little girl is gone, you men cannot call it back, the sympathy of the defendant's attorney does not blot this grief out that this fellow in one criminal moment placed upon her heart. Go away with your sympathy. What she wants is that the man who killed that baby be brought to justice. But he is not satisfied in crushing the life out of this little babe, no, he must get upon the witness stand and say, 'Mrs. Hammes, you are swearing to what is not so, you are committing the crime of perjury when you say I went up that road north that day!' He is not satisfied with running over that little child and robbing this mother of its sweet presence, but he must make her out a liar and a perjurer in this court of justice. Go away with your sympathy, we want justice, gentlemen. 'Mrs. Hammes, you never saw me go up that road.'"

The defense in the prosecution for crime has no claim to a monopoly on appeals to sentiment. The state is entitled to make response in kind and if the bounds of fair argument and legitimate inference from the facts are not transcended, the accused has no cause for complaint. Again counsel proceeded:

"Gentlemen, no, we can't bring back this little girl but here sit this concourse of people; here stands the State of

Iowa with its thousands of little children; here stands the people of this state and I in my feeble way am representing them. Society demands that men that wickedly run over little children in public roads must be punished. Why, gentlemen of the jury, I do not know how you feel, but if I was an owner of an automobile and I got so careless and reckless in driving it that I would run over my neighbor's baby in broad daylight and crush out its little life and rob its mother of its laughing presence and its sweet smile of its tender loving embrace—Oh, you don't know what he robbed that Mother of, you men don't, only a Mother can tell, only a Mother knows what is in that little woman's heart; if I had committed a crime like that and they would accuse me of it and upon investigation I had found that I had gone up past there and that I came back and that on my trip back that I must have run over that baby in a wicked and careless damnable moment, I would walk into this court house and go to this judge and say, 'Judge, I have done an awful wicked careless criminal act; I have robbed a poor mother of her little baby in a damnable careless moment, I can't restore the baby, I can't feel the aching of this mother's and father's heart; no, but I can take my punishment like a man, and for God's sake punish me, bind me in chains, lock me in a dungeon'!"

We may well assume that counsel for defendant had appealed to the jury in behalf of their client and had marshaled every fact and inference in his behalf, and we are not ready to say that it is improper practice for the state to meet them with argument of like character. "Within reasonable limits, the language of counsel in argument is privileged, and he is permitted to express his own ideas in his own way, so long as they may fairly be considered relevant to the case which has been made. No lawyer has the right to misrepresent or misstate the testimony. On the other hand, he is not required to forego all the embellishments of oratory, or to leave

uncultivated the fertile field of fancy. It is his time-honored privilege to

“ ‘Drown the stage in tears.

Make mad the guilty and appal the free,

Confound the ignorant, and amaze, indeed,

The very faculties of eyes and ears.’

“Stored away in the property room of the profession are moving pictures in infinite variety, from which every lawyer is expected to freely draw on all proper occasions. They give zest and point to the declamation, relieve the tediousness of the juror’s duties and please the audience, but are not often effective in securing unjust verdicts.” *State v. Burns*, 119 Iowa 663.

This sufficiently answers the criticisms urged, but we may add that the decisions cited by appellant are not in point, for that the arguments condemned in these allude to matters outside of the record. Others may be found declaring what counsel or others would or should have done under similar circumstances. See *State v. Proctor*, 86 Iowa 698. Here state’s attorney merely suggested a plea of guilty to be the proper course in such a case if one were guilty, though this was expressed in eloquent phrase. We are of opinion that there was not a departure from the domain of fair argument and the judgment is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

J. A. STEEN et al., Appellants, v. J. M. STEEN et al., Appellees.

WITNESSES: Evidence—Transactions with Deceased—Testimony of
1 **Deceased Introduced—Effect.** A party to an action may testify fully to a personal transaction or communication with a person deceased, when the testimony of such deceased person as to such personal transaction or communication is introduced into the record by his adversary. (Sec. 4604, Code.)

PRINCIPLE APPLIED: A father executed to his son a deed. Soon thereafter some of his children brought an action praying

that the court appoint a guardian for the father. At this hearing the father testified fully in regard to the transaction and communications passing between himself and his son which culminated in the deed in question. After the death of the father, his children, other than grantee in the deed, brought this instant action to set aside the deed on divers grounds. Plaintiffs introduced the testimony of the father given upon the application for guardianship. *Held*, this opened the door to the grantee to testify to the same transaction and communications.

DEEDS: Undue Influence—Mental Incapacity—Father and Son—

- 2 **Fiduciary Relation—Burden of Proof.** The naked fact that the grantee in a deed is a son of grantor does not throw upon grantee the burden of proof to show there was no undue influence exercised upon grantor in the execution of the deed. The burden of proof to show undue influence clings to him who alleges it until he establishes the confidential and trust relationship. In the instant case no such trust relationship was established.

DEEDS: Consideration—Support by Child—Property Exceeding Sup-

- 3 **port.** An agreement to support and care for the grantor during his life is a sufficient consideration to support a deed, even though it turns out that the value of the property conveyed largely overpaid for the support of the grantor.

DEEDS: Parent to Child—Proferring Child—Prejudice Against Child

- 4 **—Effect.** The fact that a parent is influenced by prejudice against certain of his children, founded upon a rational conception of his relationship to them, or that he has a preference for one over another, where this seems to have a rational basis, is not sufficient to justify the court in setting aside his deed. In instant case, *held*, deed should not be set aside.

WITNESSES: Transactions with Deceased—Non-Participation in

- 5 **Transaction.** A party to an action may testify to a transaction or communication between a deceased person and another in which he took no part.

Appeal from Harrison District Court.—HON. O. D. WHEELER,
Judge.

TUESDAY, FEBRUARY 23, 1915.

ACTION in equity to set aside a deed on the ground that the grantor was mentally incapable of making a valid conveyance, and further, that in procuring the conveyance, the

grantee exercised undue influence over the grantor. Decree for defendants.—*Affirmed.*

Cochran & Barrett, for appellants.

J. P. Organ and Burke & Tamisiea, for appellees.

GAYNOR, J.—Upon and prior to the 23d day of October, 1911, John Steen was the owner of the land in controversy, consisting of about 100 acres. On that day, he and his wife, Jerusha Steen, one of the defendants, conveyed the same by warranty deed to his son, the defendant herein, John M. Steen. This deed recites a consideration of \$10,000.00 in hand paid and was duly recorded.

John Steen died on the 30th day of December, 1911. The plaintiffs and the defendant, John M. Steen, are his children, and Jerusha Steen is his widow. This action is brought by the plaintiffs as heirs at law of John Steen to set aside this conveyance on two grounds.

1st. That John Steen, the grantor, was incompetent to make the same at the time it was made, by reason of advanced age, infirmity, and sickness, and that he did not and could not comprehend the full effect of his act, and by reason of mental weakness, did not understand he was conveying the property, and that the deed was without any consideration.

2nd. That he was unlawfully influenced to make the deed; that undue influence was exercised over him at a time when he was sick and infirm, and his mind weak, and he was easily influenced; that this undue influence was exercised by the grantee in the deed, John M. Steen, and the other defendant, mother of John M. and wife of John Steen, in this,—that they excited undue prejudice against the plaintiffs and other influences which it is not necessary to set out here.

John Steen, at the time of his death, was about eighty-two years of age. He had nine children living, three girls and six boys.

This case was tried in open court before the court, and,

after a full submission, the court found for the defendants, dismissing plaintiffs' petition and entering a decree in favor of the defendants on their cross-petition, quieting title in them against the claims of the plaintiffs. From this decree plaintiffs appeal, and urge:

1. That upon the evidence submitted the court erred in finding for the defendants, and in not finding affirmatively both want of mental capacity and undue influence, as charged by the plaintiffs.

2. That incompetent testimony was admitted over the objection of the plaintiffs.

This case is triable *de novo* here, and it is our duty to review the entire record and exclude from our consideration all evidence that is not competent and relevant to the issue tendered, and all evidence that comes from the lips of witnesses who were incompetent to deliver it.

The first error relates to the action of the court in permitting Jerusha Steen, the widow, to testify on the part of defendants, to personal transactions had with her husband touching this matter, and the general rule is invoked to bar such testimony, reliance being had on the provisions of Sec. 4604 of the Code of Iowa; *Hanson v. Gallagher*, 154 Iowa 192, 199; *Clarity v. Sheridan*, 91 Iowa 304, and *Cochrane v. Breckenridge*, 75 Iowa 213.

Whether the court erred in the admission of this testimony depends upon the construction that must be given to the last clause in this section, which reads: "But this prohibition shall not extend to any transaction or communication as to which . . . the testimony of such deceased . . . shall be given in evidence."

The plaintiffs, in support of their contention, offered themselves as witnesses and were examined upon this trial, fully detailing all that transpired within their knowledge, and all the facts and circumstances relating to the habits, life, and condition of the deceased, about and prior to the time of the making of this instrument.

It appears that after this deed was executed and about the 13th day of November, 1911, an action was brought by some of the children of John Steen, deceased, to have a guardian appointed for him. A hearing upon that application was had and John Steen, now deceased, was called by the plaintiffs and examined in open court before the jury, and his testimony taken down in shorthand. At the conclusion of his testimony, the cause against him was dismissed by the attorney representing the plaintiffs in that cause, with this remark: "Uncle John, (referring to John Steen), I don't think you need any lawyers or witnesses. I am going to withdraw this case, but I made up my mind to satisfy myself."

Upon the trial of the present case, the testimony of John Steen, so taken at that hearing, was introduced in evidence by these plaintiffs, and is as follows:

"My name is John Steen. I will be 82 years old next birthday. I was born and raised in Pike County, Ohio, and settled in Harrison County in 1865. I first bought a farm over near Mondamin, and later moved to Calhoun Township. I have nine children living. John is 25 years of age and married. I have always been on good terms with my children. I have never been very sick, I have worked pretty hard and never been idle much. I worked along until the last two or three years. I was on the farm and had charge of the cattle and stock and horses. I did not farm much, I saw it was too much work for me and I quit and turned over the farm to my son Joe, and I went down to Missouri Valley and bought me a house there. I stayed there and run my business until a short time ago, and I then moved out onto the farm because it was too much work for my boy, and John was the next boy he was hauling the wood and getting nothing for it and doing a whole lot of work for me, and we concluded we had better come together, and I sold him 100 acres of land and he was to build a house and keep me and his mother as long as we lived. And so I lived along with him and we are living there

now, and are building a house to live in right close to John's. He has always been good to me and is the only one that ever did wait on me. He hauled wood and corn and grain and hay, and I did not want him to be working there alone and so we moved up there. When I made the deal with John, we had writings about it. I sold him 100 acres, the old home, and he was to give me \$10,000.00 for it, and he paid me \$4,000.00 down and then I took a contract for the balance, and he was to pay what we needed out of that for our help. I don't know where he got the \$4,000.00 that he paid me, but I think he made a mortgage. The \$6,000.00 is in separate contract and he takes care of my wife and me as long as we live, and whatever we cost him on that account. And then he pays me 5½ per cent on that \$6,000.00, and, of course, when we are gone, the rest will be paid out. I won't be there to count it and he and they can count it, that will be the difference. He has been buying things for us ever since we made the deed. We are just there as a family."

Q. "He is going to pay you the other \$6,000.00 by keeping you and your wife?"

A. "Yes, sir.

"He has to take care of us in every respect. We are not supposed to do anything unless we want to. He has to take care of us as long as we live, through sickness and health until we pass out. Now we may live that all up, and maybe not. I made this arrangement with John before I sold my house and lot at the Valley. We had this understanding and I made him a deed to the land and he commenced to build a house, and he is putting up a good house and he furnishes the house. He gets his money to build the house out of the cornfield. He farmed the place last year and has got lots of corn. I rented him the land for two years before and he was to give me for rent one-half of all the corn and wheat and everything. The corn has been sold and we got the money long ago. I got my share of the crop and have had plenty of money all the time. I have 201 acres of land besides what

I sold to John. I did not offer the 80-acre farm for \$60.00 an acre. I have refused \$60.00 an acre for the land that is unimproved. The 100 acres that I sold John is worth \$100.00 an acre. I was not offered \$12,000.00 for it. I would not have sold it to an outsider at all, because I had this 301 acres of land, expected to keep it for the benefit of my family. I still have 201 acres. I have never offered that for sale."

Q. "Now, did you take notes and mortgages from John for this 100 acres?"

A. "Well, I have a written contract just as I stated to you, a written contract for \$6,000.00, and you know he pays that by keeping us and taking care of us.

"We drew that contract ourselves. It is here in my pocket. I ain't much of a business man, but I have always kept my business straight and right up to the dollar."

Counsel asks witness for the contract and same is handed to him and marked Exhibit "1" and offered in evidence.

"The name John M. Steen on that contract is that of my son, and the name Frances M. Steen is that of his wife. That explains the whole affair between John M. Steen and old John Steen. There is nothing outside of that."

Q. "What kind of a writing did you give them to sign?"

A. "That is all we needed. The obligation is on him the way we looked at it. There is no obligation on us, and consequently, he and his wife wanted it.

"We did not put the contract of record because we did not think it was necessary."

Q. "Now, you remember the incident of making a deed out, don't you?"

A. "I remember everything of course, there is nothing wrong with my head.

"We didn't think it was necessary to have it recorded. That showed to him and me and the rest of the children just what we had done, that is the way we looked at it. We didn't know we were going into law. I have somewheres near forty

head of cattle, four head of horses, one mule and seventeen head of hogs. Joe is running that part of it you know. I am on section 30 and over in 25 I have an 80, and then we are getting the hay on 21 on the hill. There is 80 up there and that makes the 201 acres. For rent I got one-half all the time. The income from all would amount to about \$1,500.00. I never estimated how much it would cost to keep me and my wife a year, John wanted to buy the land and I did not need it, and was going to sell him that in order to go in partnership there and have a home as long as we lived. We talked about making a trade and we made a trade. That was all there was to it. I don't know when he first spoke about buying the land. He was working for me unnecessarily and I thought we would come together, and he would take care of me without working so much for me. I don't remember whether he spoke to me or I spoke to him first about the matter. My wife was anxious to have it. She wanted to be with him, and she thought she would not have so much hard work to do and it would be less trouble for all of us. I have been on the mope the last couple of years. I ain't been down much. I ain't been sick but two or three days at any time. The last time, Dr. Devore attended me a little. I took a congestion and chill and my blood was running slow. I was getting old and there was one day and night last winter I did not know anything. Then Dr. Devore brought me out of that and I have been on my feet ever since."

Q. "Did you have any talks with all the members of the family present before you made this deal with John?"

A. "Yes, sir, I told them what we were going to do, I do not know as I seen any of them. It was common talk."

Q. "Name the children that you talked in the presence of."

A. "I wasn't making a minute of it, and I could not answer about it. But there was John and Frank and Rene and Ada. Them four you know was passing back and forth, and of course I talked with them."

Q. "Did you tell them what you were going to do?"

A. "Yes, sir, I had no secrets about my business at all.

"I can't say which of the boys worked on the farms most. They worked for me and went to school until they arrived at age when they were able to do men's work. I don't think there was but one of my boys that stayed with me until he was 21. I was able to run my business without binding them you know, and then when they had finished their schooling and they wanted to go, and some went at 17, and some at 18, and there was but one that stayed until he was 21, that is Willis. He is south, I don't know where. I paid out about \$400.00 in cash to help him get a team, etc. But his ability wasn't good enough to do business and after I had gone so far, I stopped. I had done my duty. I had done the same with Frank, etc., and when I thought I had done my duty as a father, I stopped. I don't think I gave John anything when he got married, not directly. He came home and went to work. I can't recall that I paid any debts for him."

Q. "You could not give any of your boys any send off on their ability to accumulate property?"

A. "I tried to help them to work and let them use my teams and they didn't cost them a cent. And I have helped them a little now and then, and I have always had plenty of cattle, and when they were short on cows, I said, 'Here, take a couple of cows.'

"We were down there and no wood or feed or anything, and I kept a cow and horse there for convenience, and somebody had to take and haul this stuff to us from the farm. And John, he took right hold and done everything for us he could do and got our wood and hay and corn, and you know it worked up a sympathy for him. You know how it would be. Ma at first said we should get closer together, that is the way it started. And after we had commenced thinking about it, we made up our minds we would get together and now we are together. That is all there is to it. Ada was a matron in the hospital, and her man lives in Michigan. He is traveling

agent for a company there. Rene is working down in the hospital and has been for a couple of years. All my children are comfortable, but they haven't accumulated anything ahead, some of them and some of them have. Some have a business of their own but none of them that I know of, own a home. I have 201 acres of land left, and there is not a nickel against it, and I don't owe a dollar in the world. The land I gave John is the old farm I first bought of Grandad Belden. I worked there and lived there a long time, and accumulated a little more land. The land I sold John is about a mile south of Calhoun. The 80 acres is about a mile north. I bought more land up there on 18, and then I got 121 acres, which, with this 80, makes 201. I bought a piece of property in Missouri Valley for \$1,200.00 and sold it for \$800.00. I got for it a \$500.00 note drawing interest, and four town lots in Missouri Valley. I got rid of the property because I did not have any use for it. I considered that the income on the town lots and the interest on the property was worth more than would pay me for taking care of it. But I done the best I could with the property. I could not have done any better. I have had no offers for the property in the hills. A number of times men would have liked to buy it, but it wasn't for sale. I deeded my wife 40 acres you know so that if anything happened to me she could hold her home, and then we wanted another home different, and so we sold that to John and that's all there is to that."

Q. "I suppose you thought the matter over quite a while and talked it over with your wife and talked it over with John and his wife?"

A. "Yes, sir, I have no secrets about that."

Q. "And they promised very faithfully that they would carry out that deal and take care of you as long as you lived?"

A. "Yes, sir, and I believe it.

"I have lived close to John most of the time for 25 years, since he was born, and he stayed around me and worked with me you know and he was with me. He was down in Oklahoma

for two years. I moved down to Oklahoma too, but I had not come back when John did. I couldn't get any land in Oklahoma. I had worked and deeded 160 acres of land and Uncle Sam would not let me file on anything. I bought one the first week I was down there, the prettiest house you ever saw and barn, etc., and I turned it over to my son-in-law, Frank Wadsworth, because at the land office they would not let me have it. But Frank Wadsworth has it now. I paid for it though I never made a will. Oh, I have had an intention but I am not worrying about it."

Q. "Have you had any talk with Mrs. Dennis, your daughter, about this transaction with Johnny?"

A. "No, she got awful mad about it and didn't like it at all, and she is a woman of marrying age, and has been doing for herself for a long time. I have run my business all my life, ever since I have been a man, and I have never had a dollar given to me, and I have just come along up and raised my family, and there was never a time that I could not put my hand in my pocket and get a dollar if I wanted it. She got mad and took to the road and I did not think it was any of her business. I have raised this family and have had plenty of money all the time. I gave Willis about \$400.00 in money and Frank about \$300.00. I did not keep any account of that unless I took some notes. I did not calculate it, no, sir. They just squared it."

Q. "You do not recall about making a will or talking about a will?"

A. "No, sir."

Q. "You are just down to that part of life where you and your wife needed a little better care?"

A. "That is just it. We might have made a mistake, no man is perfect, no, not one. And we thought we had done what was right for our benefit. And of course, he should have had a benefit.

"I just put that \$4,000.00 in the bank for 4 per cent interest and I don't know of anything I could use it for to

an advantage. You know I want to make an honest dollar, and so if I could strike something that there was some money in, I can draw that money any time, but I want that to pay the interest."

Mr. Cochran: "Uncle John, I do not think you need any lawyers or witnesses. I am going to withdraw this case, but I made up my mind to satisfy S. H. Cochran."

On the same day that the deed in question was made, the following agreement was signed by the defendant, John M. Steen, and his wife, Frances M. Steen, and delivered to the deceased:

"The 23d day of October, 1911, We, John M. Steen and Frances M. Steen, husband and wife, do hereby agree to pay John Steen and Jerusha A. Steen, his wife, both or either of them, interest at the rate of Five and a half per cent on the sum of Six Thousand Dollars as long as either of them shall live; the interest to be paid annually or semi-annually dictated by them. We further agree to give them the use of the house now under construction on the farm conveyed to John M. Steen by them, free of all charge and rental, as long as both or either of them shall live. We further agree to furnish said house with first class workmanship in every respect. We further agree to keep them supplied at all times with wood as fuel and to give them free access to water and garden and meat of that grown on place; and to care for and milk a cow for them and to give them the privilege of keeping a horse and vehicle on the place for their private use. We further agree to care for them in time of sickness to the best of our ability, and in accordance to their dictates, to procure necessities for them from town at any time. If both or either of us, the first parties, should become deceased, John Steen or Jerusha A. Steen shall have the aforesaid benefits of the farm as long as either or both of them shall live. When both the second parties become deceased, the said premises and all im-

provements become the private property of the first parties, and all interest stops."

This is the contract referred to in John Steen's testimony, hereinbefore set out as Exhibit 1.

The next day after the dismissal of the application for appointment of a guardian for John Steen, the parties entered into the following contract:

"John M. Steen and Frances M. Steen, husband and wife, hereby agree, and all the parties hereto fully understand, that, in addition to the contract heretofore made, dated and signed October 23d, 1911, that at the death of John Steen and Jerusha A. Steen, all debts for the land described in the foregoing contract are discharged and to an end, both interest and principal. Dated and signed November 24th, 1911."

These two contracts were, on that date, pinned together and delivered to either John Steen or his wife, Jerusha, it does not definitely appear which.

At the conclusion of plaintiffs' testimony, John M. Steen was called in his own behalf, and over the objection of the plaintiffs was permitted to testify that he was the grantee in the deed in controversy; that, at the time the deed was made, he was renting the one hundred acres therein named, from his father, and after the making of the deed, he continued in possession; that, in connection with the purchase of the land, there was a written agreement made between him and his father (this agreement is the one referred to by John Steen in his testimony, hereinbefore given); that he and his wife both signed it on October 23, 1911. He testified, "I heard my father's testimony read. Before that deed was made, my father offered to sell the land to me for \$10,000.00, I to pay \$4,000.00 in cash, and to provide fuel, meat and take care of them as long as they lived. The house is under construction, but not finished, and they were to have

1. WITNESSES :
evidence :
transactions
with deceased :
testimony of
deceased in-
troduced :
effect.

the use of it free of charge, and, of course, everything on the place. I was to pay \$4,000.00 in cash, and the balance, \$6,000.00, was to draw interest, and at his death, the \$6,000.00 was to be mine, and the land. The horses referred to in my father's testimony were his and are part of the estate. I entered into these contracts with my father in good faith. The new house was completed on November 24th, except lathing and plastering. Father and mother never lived in the new house. They lived with me in the old house. I paid my mother the \$340.00 interest on the \$6,000.00 after my father's death."

There were other matters drawn out from this witness on cross-examination that were in no way responsive to or explanatory of the testimony given by John Steen, the deceased. Of this, the plaintiffs cannot complain. They do, however, object to any testimony from John M. Steen, on the ground that he was incompetent to give it, and this would be true if it were not for the exception provided in Sec. 4604. The object of closing the mouth of a party against testifying to personal transactions with a deceased is that the other party, being dead, cannot, of course, give his version of these facts, and the door might be opened to perjury and fraud; but where the testimony of the dead party as to the same matter is fully before the court, the reason for the rule does not obtain, and therein lies the reason for the exception. It will be noticed that on the direct examination, the testimony of John M. Steen was confined entirely to those matters referred to in the testimony of John Steen, his father, and to nothing else. In the testimony of John Steen is found a full explanation of the making of these contracts, and of the consideration agreed upon, and the motive that led up to the making of them. At the time this last contract was made, John M. Steen testified that his father said to his mother that the contract was not clear as to where the \$6,000.00 was to go; that he had not made any provision for it in the original contract. He

said to make an amendment and make it more clear. "He suggested we write it out in an amendment. I had no knowledge of his intention to do this prior to that. My father first mentioned this method of disposing of the \$6,000.00."

We think the testimony of John M. Steen was clearly within the exception provided in Sec. 4604, hereinbefore referred to, and the court did not err in permitting him to testify.

It is next contended that the burden of proof in this case is on the defendants to establish want of undue influence.

2. DEDUCE: undue influence: mental incapacity: father and son: fiduciary relation: burden of proof.

It is contended that the conveyance was without consideration and that the relationship of the parties was of such a character that the burden of proof should be placed upon the shoulders of the parties seeking to maintain the good faith and integrity of the transaction,—upon the party who reaps the benefit.

The general rule is, that the burden of proof is on the party seeking to establish undue influence. The exception is, where there is established a fiduciary and close confidential relationship between the parties, and special trust and confidence reposes in the recipient of the bounty, the burden shifts. Upon this point see *Reese v. Shutts*, 133 Iowa 681; *Chidester v. Turnbull*, 117 Iowa 168; *Mallow v. Walker*, 115 Iowa 238; *Curtis v. Armagast*, 158 Iowa 507.

The mere fact of the relationship of parent and child does not, in and of itself, establish a relationship that casts the burden upon the child when a conveyance is from the parent to the child.

This case is peculiarly clear of any fiduciary or confidential relationship existing between the father and the son. John Steen, Sr., seems to have been a man of strong will, of clear mind, of good business ability, a man who, as he says himself in his testimony, always attended to his own business. "I have run my business all my life, ever since I have been a man, and I have never had a dollar given to me, and

I have just come up and raised my family, and there never was a time that I could not put my hand in my pocket and get a dollar if I wanted it." There is no evidence of any influence used by John M. Steen to induce his father to make the conveyance. The reason John Steen, Sr., assigns for making the deed, in the testimony which he gave in the trial heretofore referred to, is that "John took right hold and did everything for us he could do. He got up our wood and our hay and our corn, and you know, that worked up a sympathy for him. Ma said we should get closer together. That is the way it started, and after we commenced thinking about it, we made up our minds we would get together, and we are together, and that is all there is to it."

It is contended that one element in this case is that the conveyance was without consideration, but the agreement between the parties and the testimony of John Steen, Sr.,

3. DEEDS: consideration: support by child: property exceeding support.

himself shows that it did rest upon a consideration. In the absence of undue influence or fraud, a party in the possession of his faculties has a right to make a gift or a conveyance of his property upon any consideration that he may fix, except as against his creditors. An agreement to support and care for the grantor during his life is a sufficient consideration to support a deed, even though it turn out that the value of the property conveyed largely overpaid for the support of the grantor. See *Pellizzarro v. Reppert*, 83 Iowa 497; *Schneitter v. Carman*, 98 Iowa 276; *Walker v. Walker*, 104 Iowa 505; *Lewis v. Wilcox*, 131 Iowa 268.

The right of a parent, either by will or by deed, to make such a disposition of his property as he may see fit cannot be questioned by his heirs, without an affirmative showing that

4. DEEDS: parent to child: preferring child: prejudice against child: effect.

he was incapable of making the conveyance, or that the act was not his because of undue influence exercised upon him. The fact that he is influenced by prejudice against his

children, founded upon a rational conception of his relation-

ship to them, the fact that he has a preference for one child over another, where this seems to have a rational foundation, is not sufficient to justify the court in undoing what he did. See *Nowlen v. Nowlen*, 122 Iowa 541; *Kennedy v. McCann*, (Md.) 61 Atl. 625; *Justice v. Justice*, (N. J.) 18 Atl. 674.

There is another rule that has been recognized in this court, and this applies to the testimony of Frances M. Steen, wherein she undertakes to state what was said between her husband and his father preceding the making of these contracts, and it is this: "Though a party, who comes within the inhibition of the estate, cannot be permitted to testify to personal transactions between him and the deceased, yet he may be permitted to testify to conversations in which he took no part, but which he overheard between the deceased and another." This rule is stated in *Johnson v. Johnson*, 52 Iowa 586.

5. WITNESSES :
transactions
with deceased :
non-participa-
tion in transac-
tion.

We have not attempted to set out all the testimony—much of it appears to us inconsistent and unreasonable; much, mere opinion founded upon no substantial basis; some of it, we fear, influenced by considerations of personal gain; some of it, so flatly in contradiction of other testimony which seems to us to be entitled to as much, if not more, credit that we do not feel like setting it out. We have examined the record with care and are satisfied that John Steen, Sr., was competent to make this deed; that no undue influence was exercised upon him in the making of it; and that, while it may seem unfair to some of the other heirs, yet it must stand as his deed. The mere fact that the deed seems to involve an inequitable distribution of his property, in the absence of more, does not justify the intervention of this court.

We find no reason for interfering with the judgment of the court below, and the cause is—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

EARL G. JONES, Plaintiff and Appellant, v. CHARLES C. Mc-
CLAUGHRY, Defendant and Appellee.

COURTS: Terms of Court—When Terminated—Ordering Recess—

- 1 **Effect on Life of Session.** A term of court continues from the legal convening thereof until (a) the commencement of a new term or (b) adjournment *sine die*. An order declaring the court "in recess until further order" does not terminate the term. A term of court may legally continue in one county even though the judge is holding a term in another county. (See Sec. 232, Code Sup. 1913.)

PRINCIPLE APPLIED: The October term of the Adams county district court legally convened. On October 28th, the "court was declared in recess until farther order." Later, and before the time of the commencement of the next Adams county term, the judge returned from another county of the same district where he had been holding court, reopened court in Adams county, received a plea of guilty in a criminal cause, and proceeded to pass sentence. *Held*, the Adams county term was still in session—that the court was not acting in vacation.

COURTS: Terms of—Adjournments Without Definite Date—Practice

- 2 **Condemned.** The practice of adjourning court without definite date for reconvening, while legal, is strongly disapproved.

INDICTMENTS AND INFORMATIONS: Filing Information With-

- 3 **out Judge's Approval—Motion to Set Aside—Waiver.** Under the county attorney information law, Ch. 188, Acts 34 G. A. (Ch. 12-A, Tit. XXV, Sup. Code, 1913), an information filed without the approval of the judge (Sec. 5239-e, Sup. Code, 1913) may be set aside provided the motion is made before plea is entered by defendant. (Sec. 5239-m, Sup. Code, 1913.)

CRIMINAL LAW: Oral Sentence—Entry on Calendar—Record Entry

- 4 **Omitted—Effect.** A sentence imposed under a plea of guilty and a minute thereof entered on the judge's calendar is wholly without effect as a judgment until actually entered on the record book.

PRINCIPLE APPLIED: Defendant being brought before the court entered a plea of guilty to an information filed against him.

The only showing of judgment was this entry: "Judgment and sentence was then entered in the calendar and the court was declared at recess." *Held*, wholly ineffectual as a judgment and that the imprisonment thereunder was illegal.

CRIMINAL LAW: Sentence Imposed—Failure to Enter Judgment—

- 5 **Effect—Remand.** A defendant is not entitled to a discharge from custody because of the failure to enter a judgment against him on his plea of guilty. The limit of his right is to be remanded to the custody of the sheriff of the county to await proper procedure under the information.

CONSTITUTIONAL LAW: Proposal to Amend—Duality—General

- 6 **Related Scheme.** Two distinct "objects" must not be so intermingled in a proposed amendment to the constitution that the voter is unable to freely express his choice on each without reference to the other. The proposal to amend must be confined to one general related scheme. But the "object" is of the essence of the proposition, and the assembly has fair discretion in shaping the proposals. (Sec. 2, Art. 10, Const.) Proposal in question *held* not subject to the vice of duality.

PRINCIPLE APPLIED: The proposal (Sec. 15, Art. 5, Const.) sought to fix the membership of the grand jury at not less than 5 nor more than 15 or to authorize the assembly to provide for holding persons to answer for criminal offenses without a grand jury. *Held*, the "essence" of the proposal was the *mode of accusation* and the proposal was not subject to the vice of duality.

CONSTITUTIONAL LAW: Amendment—Validity—Long-Continued

- 7 **Recognition.** The long-continued recognition (30 years) by all departments of the government of the validity of an amendment to the constitution is persuasive as to its validity.

CONSTITUTIONAL LAW: Proposal to Amend—Entry on Journal—

- 8 **Vote Elsewhere—Identification.** The proposed amendment need not be entered on the journal immediately preceding the taking and entry of the yeas and nays thereon. It is sufficient if the proposal appears somewhere in the journal. It is sufficient, when the yeas and nays are taken and entered, that the journal shows that the particular house was voting upon the proposal in question.

PRINCIPLE APPLIED: The Senate Journal showed: (a) That one joint resolution containing four distinct propositions to amend was messaged from the House to the Senate, (b) that the four proposals were set out in full in the resolution, (c) that the

resolution was entered verbatim on the Senate Journal, (d) that later the committee reported favorably the "House Joint Resolution by Dungan proposing amendments to the Constitution," (e) that later the Senate took up the "Joint Resolution proposing amendments to the Constitution," (f) that a motion was made to strike out all but the first two resolutions and lost, (g) that a motion was then made to strike out the last resolution and lost, (h) that the rule for engrossment was then suspended and the yeas and nays taken and entered on the resolution *as a whole*. No other resolution for the submission of amendment or amendments to the Constitution was then pending in either house. *Held*, (a) the one entry of the proposals on the journal was sufficient and (b) the journal clearly showed *what* was voted on.

CONSTITUTIONAL LAW: Several Proposals Under One Resolution

- 9 —**Separate Roll Calls.** Several proposals to amend the constitution may be agreed to in the same resolution and a separate calling and entry of the yeas and nays on each separate proposal is not required.

PRINCIPLE APPLIED: (See preceding facts.)

CONSTITUTIONAL LAW: Holding by Indictment or Information—

- 10 **Assembly's Power to Determine.** Sec. 15, Art. 5, Const., when construed with Sec. 11, Art. 1, Const., has no other effect than to permit the assembly to require accused persons to be held to answer for the specified higher offenses (a) solely by indictment by grand juries, or (b) solely by information without the grand jury, or (c) in part by indictment and in part by information.

CONSTITUTIONAL LAW: General Operation of Laws—Informa-

- 11 **tion—Indictment—Term Time—Vacation—Difference in Procedure.** The "uniform operation" of general laws commanded by the constitution is furnished by every law which operates upon every person within the relations and circumstances reasonably provided. Reasonable discriminations may be made to meet differences in situation. (Sec. 30, Art. 3, and Sec. 6, Art. 1, Const.) So held under County Attorney Information Act.

PRINCIPLE APPLIED: The County Attorney Information Act authorizes arraignment, plea and judgment in vacation. If the same defendant was charged wholly by indictment the same acts would be wholly in term time. (Secs. 5315, 5334, 5431, Code.) *Held*, difference in procedure, in view of the difference in situation, is authorized by the constitution, especially as the provisions for arraignment, etc., in vacation is for the benefit of the accused.

Appeal from Adams District Court.—HON. H. K. ADAMS,
Judge.

SATURDAY, FEBRUARY 26, 1915.

THE facts appear in the opinion.—*Remanded.*

Earl R. Ferguson, C. R. Barnes, for plaintiff.

George Cosson, Attorney General, John Fletcher, Assistant Attorney General, and A. Ray Maxwell, County Attorney, for defendant.

LADD, J.—On the 4th day of November, 1913, a preliminary information, charging the defendant with the crime of kidnapping, was filed before a justice of the peace in Adams County, and on hearing, he was bound over to await the action of the grand jury. On the 8th day of November, following, the county attorney prepared and made oath to an information charging the defendant with the same offense and this was filed with the clerk of court and thereafter endorsed by his honor, H. K. Evans, a judge of the district court, approving the prosecution on information. The said judge had been presiding during the day at a term of court holden in Creston in Union County and came by railway to Corning, the county seat of Adams County, in the evening of that day at about eight o'clock and proceeded to the sheriff's office in the court house of said county and went through the regular form of convening court, all officers being there present. Thereupon defendant was brought before the court, fully informed of the charge made against him, and an attorney appointed to defend him. The proceedings are thus described in the record:

"Saturday, November 8, 1913. Court was called at 8:15 P. M. with H. K. Evans, as sole presiding judge. H. F. Hull, Sheriff, and F. D. Lawrence, Clerk.

"Case No. 5255, *State of Iowa vs. Earl G. Jones*, came up for hearing, and the defendant having filed his written plea of guilty, the court appointed C. W. Stanley as his attorney and informed the defendant of the nature of the

crime as charged in the information and asked the defendant if he had any reason why judgment should not be pronounced at this time to which the defendant replied in the negative. The judgment and sentence was then entered in the calendar and court was declared in recess until further called."

Mittimus was issued and the defendant taken to the reformatory at Anamosa. On May 15, 1914, he, as plaintiff, presented a petition to one of the judges of this court praying that a writ of habeas corpus issue and alleging as grounds therefor: First, that neither the court nor judge thereof had jurisdiction to sentence the plaintiff; (a) for that sentence was not pronounced at the place prescribed by Chap. 188 of the Acts of the 34th G. A.; (b) that the information was filed before being approved by the judges; (c) that no valid judgment was ever entered of record; (d) that the court was not in session but judgment entered in vacation; (e) that even if the court were in session, a written plea of guilty was not in compliance with the law. Second, that Sec. 15 of Article 5 of the Constitution was never adopted in the manner exacted by the Constitution and therefore the prosecution by information instead of by indictment was wholly unauthorized and void.

I. Counsel contend in behalf of the defendant that court was in session and that the judgment was not entered in vacation. It appears from the record that the October, 1913, term of court in and for Adams County convened at the time prescribed by the order of the judges. On October 28, 1913, the record shows that the "court was declared in recess until further order." There was no other session until the convening of court in the evening of November 8, 1913. It is argued that inasmuch as the adjournment was not to a day certain, the term lapsed as a matter of law. There is nothing in the Code so providing. On the contrary, the fair inference is that the term of court commencing on the

1. COURTS:
terms of
court: when
terminated:
ordering re-
cess: effect on
life of session.

day fixed by law continues until it expires by reason of the commencement of another term in the same county or because of having been adjourned *sine die*. The adjournment from day to day or to some distant day is simply for convenience in the transaction of business. Such adjournments do not suspend the functions of the court, for it is common practice for the grand jurors to continue in session during the intermissions of court, and for petit juries to continue in deliberation and the court to receive verdicts during the recesses incident to the adjournment from day to day. These juries are part of the court, performing important functions, and the court does not suspend its functions so as to be able to protect juries and enforce proper conduct on their part. "For all general purposes, the court is considered in session from the commencement to the close of its term." *Barrett v. State*, 1 Wis. 156. At common law, the whole period of a term was looked upon as a single day, and everything done at the term was regarded as done of that day. We need not point out what innovations statutes have made on this doctrine but we nowhere find it entirely abrogated.

In *Union Pacific Ry. Co. v. Hand*, 7 Kans. 380, 387, the trial court adjourned from Saturday until Monday and the judge did not appear until Wednesday, when a motion for new trial was overruled, and the supreme court held the trial court properly in session.

In *Labadie v. Dean*, 47 Tex. 90, it was said: "The sessions or sittings of the court during term are entirely within the discretion and control of the court. And its orders in respect thereto are intended for its convenience and the convenience of parties interested in its proceedings. Hence they may be altered, revoked, or annulled from time to time, as the exigency of the business to be transacted may require. The orders of adjournment of its sessions from day to day, or to a particular hour of the day, are mere announcements of its proposed or intended order of transacting the business to come before it during the term. But certainly the failure of

the court to meet at the hour or on the day to which it had thus taken a recess, can in no way affect or put an end to its term."

In *Commonwealth v. Bannon*, 97 Mass. 214, the judge had been holding a term of court and on December 3rd, without adjourning, left to hold a term in another county. In the meantime, the grand jury continued their investigations and he returned on the 10th or 11th and received the report of the grand jury, returning several indictments, and it was insisted by those indicted that the term of court had lapsed because of an adjournment to a day not certain. Concerning this the court remarked: "Such a result would certainly be contrary to the intent with which the course adopted by the judge was taken. It is not a case of neglect or omission to hold a term of court at the time appointed by law. The court was duly opened for the transaction of business, and it was allowed to continue without adjournment from day to day for the very purpose of enabling the grand jury to perform that portion of their duty which did not require the presence and action of the judge, while he was absent exercising judicial functions in another county. We know of no rule of law which requires during a continuance of a term after it has been properly begun, either that there should be daily adjournments of the court, or that the judge should remain in the town or county where the court is holden during the whole time that juries, either grand or petit, are engaged in deliberating and acting on matters properly submitted to their consideration. Such has never been the practice in this Commonwealth, and to require it would cause serious inconvenience, while it would produce no practical benefit in the administration of justice."

In *State v. Martin*, 24 N. C. 101, where the objection was that the days of finding the indictment, arraignment and plea did not appear from the record, and it could have been known by no one that these were at the same term of court, it was said: "The term of court is in legal contemplation as one

day; and although it may be open many days, all its acts refer to its commencement, with the particular exceptions in which the law may direct certain acts to be done on certain other days. It is seldom necessary that the day of any proceeding should appear in making up the record, distinct from that of the beginning of each term, although a minute may be kept of each day's doings. Nor is it necessary that there should be adjournments from day to day, after the term is once opened by the judge; nor, if there should be, that they should be recorded, in order to preserve the authority of the court to perform its functions. The court may, in fact, not adjourn during the whole term, but be always open; though for the convenience of suitors, an hour of a particular day, or of the next day, may be given them for their attendance. If the record state the time of doing an act, as the statement is unnecessary, so it is harmless surplusage, unless the day be beyond the period to which the term legally extends."

In *State v. McBain*, 78 N. W. (Wis.) 602, the proposition urged was that unless a term of court is kept alive by adjourning from one day to another, the term of court ends; and with reference thereto, the court said: "According to modern policy and methods a term of court, having duly commenced, continues until the court by an affirmative judicial act terminates it, or until the next term. . . . In deference to modern methods of business in court, involving in many jurisdictions the combination of equitable and legal proceedings, the term of court has come to mean a particular time within which there may be many sessions, while anciently it meant a single session, indeed, originally a single day, which, in order to meet the demands of business was enlarged in fact to several, although in theory, the single day extended over the whole sitting." And it was held that the term did not lapse in the absence of an adjournment to a day certain.

In *Green v. Morse*, 77 N. W. (Neb.) 925, the court said: "An inspection of the record discloses no state of affairs raising precisely that question. What does appear is that the

October term was begun and held October 3rd; that on that day an order, apparently regular, made 'by the court' and signed by six judges, was entered, adjourning the term until the 1st day of November. It then appears that the decree appealed from was entered October 4th by the one judge who did not sign the order of adjournment. The record does not disclose that it contains all the orders affecting the adjournment and holding of the court. There is a marked distinction between an adjournment *sine die* of a term of court and those intermissions which inevitably occur during a term. A court has the inherent power during the term of suspending business, as occasion may require, from one hour or one day to another. In this respect there is no difference between an adjournment from one day to the next, and adjournment to a more distant day. In either case the term continues, and while during the intermission, the functions of the court are for some purposes suspended, still the court remains in existence and it is still term time. The judges do not, by such an order, lose all power of control over the sessions, and may revoke the order of adjournment, and reconvene before the time first fixed." See also *Palmer v. State*, 20 So. (Miss.) 156; *Hume v. Bowie*, 148 U. S. 245, 37 L. Ed. 438; *People v. Sullivan*, 21 N. E. (N. Y.) 1039; *Bowen v. Stewart*, 26 N. E. (Ind.) 168; *Cooper v. Granger*, 108 N. W. (Wis.) 193; *Commonwealth v. Howard*, 36 S. W. (Ky.) 556; *In re Dossett*, 37 Pac. (Okla.) 1066, where it is said, "We are unable to say after a session of court is once regularly convened on the day fixed by law it can expire save by adjourning *sine die* or by operation of law. This is the rule and is too well settled to admit of controversy. In what manner can a session of court expire by operation of law if not adjourning *sine die*? Will the failure of the judge to attend on a distant day to which said court is adjourned lose the term? We think not." *Schofield v. Horse Springs Cattle Co.*, 65 Fed. 433; *In re Taylor*, 28 N. Y. Supp. 500; *In re Gannon*, 11 Pac. (Cal.) 240; *De Leon v. Barrett*, 22 S. C. 413; *Harrison v. Ins. Co.*, 90 Fed.

758; *E. Tennessee Iron & Coal Co. v. Wiggins*, 15 C. C. A. 510; *State v. Nash*, 83 Mo. App. 509; *Townsend v. Chew*, 31 Md. 247; *Garrard County Court v. McKee*, 11 Bush (Ky.) 234; *Eastman v. Concord*, 64 N. H. 263; 1 Enc. of P. & P. 245; 21 Enc. of P. & P. 631.

The language found in *Irwin v. Irwin*, 37 Pac. (Okla.) 548, is somewhat inconsistent with the rule laid down in *re Dossett*, 37 Pac. (Okla.) 1066. As suggested in the former, there is a possibility of abuse of the power exercised by a judge in keeping his court open until the following term, and in the absence of some apparent necessity therefor, the practice is not to be approved. Even when done, ample opportunity must be afforded those interested to be heard. *People v. Sullivan*, 115 N. Y. 185. In the case at bar, the sheriff and clerk of court as well as the judge were present, and every form observed in guarding the rights of complainant. There was no abuse of that reasonable discretion which necessarily must regulate the times at which the district court shall transact the business coming before it. Several early decisions are cited in which the beginning of a term of court in one county of a district was held to terminate that being held in another county. *Grable v. State*, 2 G. Greene 559; *Davis v. Fish*, 1 G. Greene 406; *Sheppard v. Wilson*, 1 Morr. 590.

This was on the theory that two terms of court could not be held in different counties concurrently by the same judge. The correctness of these holdings was questioned in *State v. Knight*, 19 Iowa 94, where a ruling was approved that the one term might be continued until a trial was completed, that in the neighboring county being adjourned to enable this to be done. This was said to be permissible owing to the change of statutes, and the decision was followed in *Cook v. Smith*, 54 Iowa 636; *State v. Stevens*, 67 Iowa 557, and *State v. Peterson*, 67 Iowa 564. In these cases, attention is directed to the fact that neither statute nor the judge's order fix the date at which a term of court shall end. In *re Estate of Hunter*, 84 Iowa 388, it appeared that the court, not having completed

the business before it in Johnson County on January 25th, adjourned until February 17th following, and in the meantime, the judge held a term in Iowa County in the same district. On February 17th, the court reconvened in Johnson County and its orders thereafter made were upheld, this court, speaking through GRANGER, J., saying: "Barring the fact that the same judge held the two terms, they are as entirely distinct and independent as are terms held in different districts. The fact that the same judge holds the two terms is not of importance. It is the holding of distinct and separate terms, each unaffected by the other."

In *State v. Van Auken*, 98 Iowa 674, the verdict was returned September 14th and the prisoner sentenced on the 28th. Court had adjourned from September 19th to the 23rd and from that day to the 28th. The judge was assigned to hold a term in the adjoining county of Hancock, beginning September 23rd, and did open court there September 24th, which continued until the 28th, and then adjourned until the 30th, the judge returning to complete the business of the term in Cerro Gordo County. The appellant insisted that jurisdiction had been lost for that the term had lapsed; but this court speaking through ROBINSON, J., observed "that the right to adjourn a court from time to time and to hold a term in one county during the time fixed for the holding of a term by the same judge in another county is well settled. . . . The court was not in session in the two counties at the same time, and it had the power to do what was done in this case when judgment was rendered." Even though the terms in two or more counties are assigned to the same judge, other judges may sit and courts be held in each at the same time. The circumstance, then, that a term of court may begin in one county is without significance in limiting the period of the term in another. It may be continued as the necessities of business or the convenience of the court or parties may require. The duty of directing the work of a term and fixing the time when particular business shall be transacted devolves

on the presiding judge, and unless there has been an abuse of discretion this court ought not to interfere. By appropriate orders, the dates when the several terms in each county shall begin are fixed, but their duration is not limited by such orders or by law, save in specifying the dates of the terms following. In this way the duration of a term is defined unless it is by order of court sooner adjourned *sine die*. In *Marengo Savings Bank v. Byington*, 135 Iowa 151, an adjournment generally and the departure for another county was held to be a final adjournment. In the case at bar, the court was declared at recess; that is, the sessions were suspended "until further order," and convening court by the trial judge in the evening of November 8, 1913, was such further order, and we are of opinion the court was then in session and the proceedings before the court rather than the judge in vacation.

2. Courts:
terms of: ad-
journments
without definite date:
practice condemned.

Notwithstanding this conclusion, we are not to be understood as approving the practice of postponing sessions of court without fixing a definite time for convening again, as has been the custom prevailing in this state. Rarely

will any advantage be derived from postponing subject to call. Convening without notice, when this is done, is likely to be misunderstood by the public. The expedition of business will not be aided thereby. No one can be certain under such a practice when causes in which he may be interested will be heard. If parties desire to try causes to the judge, between the regular sessions, this can be accomplished through an agreement to try in vacation. Without such an agreement, no judge would feel like forcing a trial arbitrarily at a time to be fixed in the future. If a prisoner chooses to plead between the regular sessions, the statute makes provision for this to be done in vacation. Indeed, had this course been pursued, the omission of a record of conviction probably would have been avoided. Though the court was in session and no prejudice resulted to the accused, the practice of postponing

court subject to call, though legal, ought not to be indulged in and is disapproved.

II. The information prepared and sworn to by the county attorney, in pursuance of Chap. 188 of the 34th G. A., was filed about noon of November 8, 1913, but was not approved

8. INDICTMENTS
AND INFORMATION:
filing
information
without judge's
approval: motion
to set
aside: waiver.

by the trial judge until shortly after eight o'clock in the evening. Sec. 5 of that chapter, among other things, directs that "the information, before being filed, shall be presented to some judge of the district court of the county having jurisdiction of the offense, which judge shall indorse his approval or disapproval thereon. If the information receive the approval of the judge, the same shall be filed. If not approved, the charge shall be presented to the next grand jury for consideration." The contention of plaintiff is that, until approved, and the approval actually endorsed thereon, the information might as a matter of law not be filed. The point is not well taken. Sec. 13, Par. 5, makes this omission a ground of motion to set aside the information, and it is therein declared that unless so raised before plea is entered by the accused, the objection shall be deemed waived. No such motion was interposed; and for this reason, the point cannot be urged in this proceeding.

III. The most serious contention of counsel is that the record does not disclose that sentence was ever pronounced against defendant. It does not appear from the record book

4. CRIMINAL
LAW: oral
sentence: entry
on calendar:
record
entry omitted:
effect.

of what offense he was accused or for what term he was sentenced. All said is that "judgment and sentence was then entered in the calendar and the court was declared at recess until further called." What calendar is referred to? Certainly not that in probate of the clerk. Sec. 3269, Code. Nor that printed for the bar. Sec. 3661, Code. Presumably, the judge's calendar was meant, but curiously enough, this is nowhere referred to in the Code save

in Sec. 3819, Code, where it is said: "A minute of an offer and acceptance shall be entered upon the judge's calendar." The minutes on the judge's calendar form no part of the record and do not constitute a judgment. *Traer Bros. v. Whitman*, 56 Iowa 443; *Miller v. Wolf*, 63 Iowa 233. They are mere directions to the clerk and of no more significance than if orally made to him. *State v. Manley*, 63 Iowa 344; *Case v. Plato*, 54 Iowa 64; *Burroughs v. Ellis*, 76 Iowa 640. The record as contained in the record book kept by the clerk is the only proof that a judgment has been entered. *Callanan v. Votruba*, 104 Iowa 672; *King v. Dickson*, 114 Iowa 160. Neither the minutes of the judge's calendar nor a judgment form signed by the judge and not recorded constitute a judgment. Until actually spread upon the record, there is no enforceable judgment or one from which an appeal may be taken. *Kennedy v. Citizen's Nat'l. Bank*, 119 Iowa 123; *Thompson v. Accident Ass'n.*, 136 Iowa 557.

Many more decisions might be cited, but this is unnecessary; for if anything is well settled in this state it is that a judgment, to be of any validity, must be spread on the record book of the clerk. And in a criminal case, "When a judgment of imprisonment, either in the penitentiary or county jail, is pronounced, an execution, consisting of a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution." Sec. 5443, Code.

That the sheriff was not furnished a true copy of the judgment entry by the clerk, nor the defendant such a copy by the sheriff upon delivery of plaintiff at the reformatory, cannot obviate the conclusion that plaintiff's detention was without warrant of law for that no judgment had ever been entered against him consigning him to penal service.

IV. The consequence of the conclusion that judgment of imprisonment was not entered against plaintiff is not that he

be released, but that he be remanded to the custody of the sheriff of Adams County to await trial of the offense charged in the information, unless Chap. 188 of the Acts of the 34th G. A., authorizing presentment by information, be

5. CRIMINAL
LAW: sentence
imposed: fail-
ure to enter
judgment: ef-
fect: remand.

inimical to Sec. 11 of Art. 1 of the Constitution. That chapter in its first section provides that criminal offenses which theretofore might be prosecuted by indictment only may be

6. CONSTITU-
TIONAL LAW:
proposal to
amend: dual-
ity: general
related scheme.

prosecuted "either on indictment, as is now or may be hereafter provided, or on information as herein provided, and the district and supreme court shall possess and exercise the same power and jurisdiction to hear, try and determine prosecutions on information, as herein provided, for all such criminal offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictment."

The third section requires the information to be endorsed "a true information," signed by the county attorney. Sec. 4 requires the county attorney to endorse or cause to be endorsed thereon the minutes of evidence and the names of witnesses he expects to call and to serve notice as in trials on indictments if he wishes to call others. Sec. 5 exacts that the information be sworn to by the county attorney before a district judge or clerk of court and be approved before filing by the district judge. There are also provisions relating to furnishing the accused a copy, amending the information, authorizing the same proceedings thereon as in case of indictment and judgment on written plea of guilty in vacation. An information such as herein contemplated was filed against plaintiff, charging him with the crime of kidnapping a young woman, which is made a felony by Sec. 4765 of the Code, and he was held thereunder when brought before the court and turned over to the defendant; and it is contended by his counsel that the entire chapter is void because contrary to

Sec. 11 of Art. 1 of the Constitution, prescribing how prosecutions shall be begun :

“All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, excepting in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.”

Though within the terms of a purported amendment to this section, it is contended by counsel for plaintiff that such amendment was not properly submitted to the electors of the state. With three others, it was adopted at the general election of 1884 and is in words following: “The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury.”

It will be noted that whereas only a prescribed class of offenses may be prosecuted by information under the original section, and all others must be by indictment of a grand jury, defined as will hereafter appear, to be not less than twelve nor more than twenty-three persons, under the amendment all may be prosecuted by information; and if prosecuted by indictment, this shall be by not less than five nor more than fifteen persons. The subject of both the original and amendment is the mode of accusation of those charged with the commission of public offenses, how this shall be done being a matter of detail. The particular criticism of the amendment is that it is in reality two amendments even though designated as one;

and, therefore, its submission as one was in violation of Sec. 2 of Art. 10 of the Constitution directing that "If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately."

The importance of this provision was referred to in *Lobaugh v. Cook*, 127 Iowa 181. Its purpose is to exact the submission of each amendment upon its merits alone and thereby secure the free and independent expression of the will of the people thereon. Incongruous matter and that having no connection with the main subject is excluded and the evil of loading a meritorious proposition with another of doubtful propriety obviated. The elector in approving or rejecting cannot be put in a position where he may be compelled, in order to aid in carrying a proposition, to vote also for another which, if separately submitted, he would reject. But this does not mean that every proposed change shall necessarily be analyzed into its minutest component parts and these separately submitted. All intended is that but one subject be dealt with in a single amendment. "If," as said in *Lobaugh v. Cook*, "the amendment has but one object and purpose, and all else included therein is incidental thereto, and reasonably necessary to effect the object and purpose contemplated, it is not inimical to the charge of containing more than one amendment."

In *State v. Timme*, 54 Wis. 318, 11 N. W. 785, in speaking on this subject, the court said: "We think amendments to the Constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different subjects and purposes in view. In order to constitute more than one amendment, the proposition submitted must relate to more than one subject and have at least two distinct and separate purposes not dependent upon or connected with each other. . . . The direction in the Constitution requiring separate amendments to be submitted separately has no efficacy in determining what

constituted two or more amendments; and as the word 'amendment' is clearly susceptible of a construction which would make it cover several propositions all tending to effect and carry out one general object or purpose and all connected with one object, as well as the construction that every proposition which effects a change in the Constitution or adds to or takes from it is an amendment, the construction which has been uniformly adopted by all the departments of government for a series of years is entitled to great weight in settling by judicial decision what construction should be placed on it."

The authorities are collected in *Lobaugh v. Cook* and to these may be added *McBee v. Brady*, 15 Idaho 761, 100 Pac. 97.

As observed in *Gabbert v. Ry.*, 171 Mo. 84, 70 S. W. 891: "One principle running through these cases, and common to them all, is that the mere fact that an amendment makes more than one change in the Constitution does not make it more than one amendment."

This is well illustrated in *State v. Herried*, 10 S. D. 109, 72 N. W. 93. Sec. 3 of Article 14 of the Constitution of that state provided that the state university and other educational institutions supported wholly or in part by the state should be under the control of six regents, appointed by the governor, three retiring every second year. Sec. 4 provided that the regents appoint five trustees for each institution under their control, each trustee to hold office five years, one retiring annually. The trustees were to appoint members of the faculty and provide for the management of the institution, appointments and removals to be subject to the approval of the board of regents. Two propositions were submitted, one amending Sec. 3 by reducing the number of regents to five and authorizing their increase by the legislature to nine, and exacting that their appointment be confirmed by the senate under such rules and regulations as the legislature shall provide, and the other repealing Sec. 4. These were numbered and submitted together and the court held that, notwithstanding the num-

bering, they constituted but a single amendment, saying: "The question is presented, Does the resolution contain more than one amendment, within the meaning of the Constitution? It is contended with much apparent reason that two distinct objects were intended, namely, the abolition of the trustees, and a change in the number and powers of the regents; that these objects are independent of each other; that either might have been adopted without adopting the other; and that there are numerous reasons why an elector might have desired one change and not the other. The defect in this argument consists in substituting for the real object or purpose one of its incidents. Control of the state educational institutions is the subject to which the proposed amendment relates. Its purpose or object is to place such institutions under the control of a single board. The membership of such board, its powers, and the abolition of the local boards, are but incidental to and necessarily connected with the object intended. Hence we conclude that only one amendment was submitted."

As said, the subject involved in the amendment was the manner of presentment of a person accused of crime in court. Whether this were to be done by information or indictment was incidental to the main subject and calculated to accomplish the purpose of a formal accusation of the particular offense committed. Under Sec. 11 of Article 1 of the Constitution the accusation could be made by information in a limited class of cases and all others were required to be by indictment by grand jury. The term "grand jury" is not defined in the Constitution, and we necessarily recur to the principles of the common law and ascertain that it is an accusing body composed of not less than twelve nor more than twenty-three jurors, and such a jury evidently was contemplated. *English v. State*, 31 Fla. 340, 12 So. 689; *State v. Hartley*, 22 Nev. 343, 28 L. R. A. 33; *State v. Barker*, 107 N. C. 913, 10 L. R. A. 50; 20 Cyc. 1317.

The purpose of the amendment was to render possible prosecution for all offenses by information and so to do with-

out interfering with presentment by way of indictment and to interfere therewith only in reducing the number of jurors required. These changes were merely details in the matter of the presentment of alleged offenders and might well be effected by a single amendment, especially as this was of a single section of an article of the Constitution. While not more than a single subject is to be covered by an amendment, some latitude necessarily must be indulged in ascertaining the real subject touched and the purpose to be accomplished; and within proper limitations, the legislature may exercise its discretion in defining the subject matter to be included in a proposed amendment. This is necessarily involved in the power of proposing amendments to the Constitution conferred on that body and we are not ready to say that in reducing the number composing the grand jury and authorizing prosecution with-

7. CONSTITUTIONAL LAW: amendment: validity: long-continued recognition.

out intervention thereof, this discretion was exceeded. We are the more confirmed in this conclusion because of the recognition of the amendment as valid by all departments of government for nearly thirty years. In our opinion, there was no defect in its submission to the electors of the state.

V. Counsel for plaintiff also contend that the amendment was never entered on the journal of the senate nor the yeas and nays taken as is necessary under Sec. 1 of Article 10 of the Constitution, providing that "Any amend-

8. CONSTITUTIONAL LAW: proposal to amend: entry on journal: vote elsewhere: identification.

ment or amendments to this Constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each

of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election."

"Entered" on the journal was held in *Koehler v. Hill*, 60 Iowa 543, followed by *State v. Brookhart*, 113 Iowa 250, to mean spread at length thereon. The object of spreading

on the record, as stated in *Koehler v. Hill*, is to "preserve the identical amendment proposed and in an authentic form which, under the Constitution, is to come before the succeeding General Assembly." The entry in the journal of the house of representatives is conceded to be without defect in this respect and that of the senate discloses that a resolution containing four amendments, including that in question, was messaged to the senate from the house as having been passed by that body and was then spread at length on the journal of the senate. Thereafter, the resolution described as "House Joint Resolution by Dungan, proposing amendments to the Constitution," was reported by the committee on constitutional amendments with the recommendation "that it be agreed to." Later on, the journal shows that:

"Joint resolutions proposing amendments to the Constitution of the State, were taken up and considered.

"Senator Russell of Jones moved to strike out all except the two first *resolutions*, which motion was lost.

"Senator Russell of Jones moved to strike out the *last resolution*, which did not prevail.

"The question being on the engrossment of the resolution, Senator Larrabee moved that the rule be suspended, and the resolution be considered engrossed, and read a third time now, which motion prevailed, and the resolution was read a third time.

"The question being, shall the resolution pass? The yeas were:

"(Setting out the vote showing 37 voting for, 5 votes against, and absent or not voting 8.)

"So the resolution passed and the time was agreed to."

No other resolution for the submission of amendment or amendments to the Constitution was then pending before either house, so that the inference that the resolution messaged from the house of representatives was that referred to cannot be avoided and the identity with that passed is put

beyond doubt. The motions of Senator Russell evidently had reference to "amendment," in making use of the word "resolution." It was not necessary to record the resolution again, it being sufficient that it with the amendments was spread upon the journal somewhere and was identified as such in

entering the yeas and nays thereon, for this
 9. CONSTITUTIONAL LAW: apprised the succeeding general assembly of
 several proposals under precisely what had been done by way of pro-
 one resolution: posing the amendments. The Constitution
 separate roll calls. contains no requirement that the proposal of
 each amendment shall be voted on separately in either house. Sec. 29 of Article 3 of the Constitution relates to an act of the legislature and Sec. 1 of Article 10, in saying "any amendment or amendments," may be proposed by either house and that if agreed to "such proposed amendment shall be entered on their journals with the yeas and nays taken thereon," is complied with if such entry is of a resolution containing several amendments as though there were but one. Surely the larger number includes the less and each amendment contained therein may be said to have been entered and the yeas and nays taken thereon.

VI. Counsel for plaintiff next argue that the amendment did not itself amend the Constitution but merely authorized the legislature to do so and assuming this, argue that it cannot

be done. Without inquiring into the consequence of such a course, it is enough to say
 10. CONSTITUTIONAL LAW: holding by
 indictment or information:
 assembly's power to de-
 termine. that such is not a fair interpretation of its effect. The clause of the amendment thus

criticised is, "the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury." The effect of this when construed in connection with Sec. 11 of Article 1, heretofore quoted, was to exact the presentment for all offenses where the penalty exceeds thirty days' imprisonment or a fine of one hundred dollars by the indictment of a grand jury, unless for such offenses or some of them the legislature pro-

vide some other method of holding persons to answer, and if so, this may be done without a grand jury. Of course, this change might well have been accomplished by substituting this amendment for a portion of the above section; but that was not essential to its amendment if, when read together, they are not necessarily contradictory. As seen, the amendment when read with the original merely authorizes legislation in pursuance thereof, as it might properly do, and is not vulnerable to the criticism urged.

VII. A person held under indictment must be arraigned in open court and on plea of guilty can be sentenced by the court only. Secs. 5315, 5334, 5431 Code. Sec. 14 of Chapter

118 of the 34th G. A. provides that: "An accused prosecuted on information may, in vacation, be arraigned by any judge of the district court, and, in vacation, be required to plead to the information before any such judge, but arraignments can be made and pleas required, in vacation, only before such judge sitting in chambers at the usual place of holding court in the county in which the information was filed, or to which the cause may be sent on change of venue. The proceedings with reference to arraignments and the taking of pleas, in vacation, shall be signed by the judge and filed with the clerk and entered at length in the records of the court with the same force and effect as if made and entered in term time."

11. CONSTITUTIONAL LAW :
general operation of laws :
information :
indictment :
term time :
vacation : difference in procedure.

Sec. 15: "Judgments may be rendered in vacation on written pleas of guilt of the offense charged, or of any degree or grade thereof, or of any offense included therein, with the same force and effect as though rendered in term time, which written plea of guilt, together with the judge's entry of judgment in reference thereto, shall be forthwith filed with the clerk and entered at length in the records of said court, and after such entry, be executed as in case of judgments on indictments, but judgments in vacation can only be rendered by a judge of the district court sitting in chambers at the usual

place of holding court in the county where the information was filed, or to which the cause has been transferred on change of venue."

The plaintiff contends that because of these differences the sections quoted are in violation of Sec. 30 of Article 3 of the Constitution declaring that in all cases "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." And also of Sec. 6 of Article 1: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens."

It is not contended that such violation would result from authorizing prosecution of one person by indictment and of another for the same offense by information. The thought is that the statute, in authorizing arraignment, plea and judgment in vacation for an offense for which if one were indicted he must have been arraigned, have pleaded and been sentenced in term time, involves a discrimination without differences in situation justifying it. The defect contended is in the classification. Thus two persons are accused of the commission of a single offense. An information is lodged against the one and the other is indicted. The former is arraigned before a judge in vacation, required to plead and may be sentenced; while in the case of the latter, all this is required in open court. The mere statement discloses the difference in situation. If indicted, court is in session and there is then no reason for not arraigning the accused, taking his plea and sentencing him in open court and by that tribunal. If the prosecution is by information, it is to be filed prior to the impanelling of the grand jury in term time or vacation, and so the arraignment, plea and sentence is then authorized. The difference in the situation of the accused seems to be such as to justify the difference in the statutes in the respects mentioned. Moreover, the arraignment and entry of plea by the accused as prescribed by statute was designed for the purpose of enabling

those accused of crime to enter on such penal service as denounced by statute without delay and is, therefore, for their benefit. This is optional with them; for arraignment always may be waived, and a plea of not guilty or of former conviction or acquittal, if entered subsequently, may be changed so that even though arraigned, the accused need not proceed to trial until term time, and even though he would plead guilty, he is not required to do so until court is in session. So it is optional with him whether he will be sentenced in term time or vacation and what is required prejudices him in no manner either as to time of sentence or in his right to trial before an impartial jury.

The act contains nothing inconsistent with the provisions of the Constitution quoted. There appears to be no reason for not prosecuting most of the offenders of this state on information. The right to do so under the Constitution as amended has been vindicated by the decisions of many states. See *Re Wright*, 13 L. R. A. (Wyo.) 748, 31 Am. St. 94; *State v. Tucker*, 51 L. R. A. (Ore.) 246; *State v. Kyle*, 56 L. R. A. (Md.) 115; *Rowan v. State*, 30 Wis. 129, 11 Am. R. 559.

The cases generally are collected in 22 Cyc. 187. The court, by directing that grand jurors be not summoned, and the county attorneys, by making use of information as authorized, could relieve such jurors of service and avoid an unnecessary expense to the public in many, if not most, of the counties of the state. Possible abuses are obviated by exacting the approval of information by the district judge. Possibly, to be entirely efficient, the statutes should be amended so that grand jurors be not summoned unless this be ordered by the judge, and requiring the county attorney to present by information in all proper cases instead of leaving this matter to his discretion. However this may be, we discover no error in the proceedings save in that no judgment sentencing plaintiff to imprisonment was entered, and because of this omission he is remanded to the custody of the sheriff

of Adams County to be held under the information and dealt with according to law. Ordered accordingly.—*Remanded.*

All Justices concur.

JOHN H. CASHMAN, Appellee, v. E. I. DU PONT DE NEMOURS
POWDER COMPANY, Appellant.

MASTER AND SERVANT: Negligence—Volunteer—Directing Ver-
1 dict. Directed verdicts cannot be ordered when there is a fair
conflict of evidence on issuable facts.

MASTER AND SERVANT: Negligence—Assumption of Risk—
2 Pleading. (A) A plea of "assumption of risk incident to the
employment" adds nothing whatever to a general denial.
(B) A plea of "assumption of risk incident to the master's
negligence" is an affirmative defense and must be specially
pleaded. (Sec. 3629, Code.)

TRIAL: Instructions—Refusal to Give—Issues Otherwise Covered—
3 Contributory Negligence. The refusal of an instruction on con-
tributory negligence is justified when the court fully directed the
jury as to the duty of plaintiff to exercise reasonable care and
directed a verdict against him if he did not.

TRIAL: Instructions Refused—Issues Otherwise Covered—Volunteer
4 Servant. Instruction covering the question whether plaintiff was
a volunteer, reviewed and held to fully cover the instruction
refused.

TRIAL: Instructions—"Summing Up" Fact Propositions. It is fit
5 and proper for the court, after the detailed instructions are given,
to briefly and tersely "sum up" the fact propositions upon which
recovery depends. Instruction in instant case held proper.

MASTER AND SERVANT: Care Required—Instructions. There is
6 no essential difference between instructing that the master must
furnish "reasonably safe machinery" and instructing that the
master must exercise "reasonable care to furnish safe ma-
chinery."

NEGLIGENCE: Customary Way of Doing Act—Contributory Negli-
7 gence per se. Contributory negligence per se cannot be pro-
nounced on the act of doing a certain thing in the customary way
and in the manner directed by the foreman in charge.

DAMAGES: Excessive Verdict—\$1,950. Plaintiff when injured was 8 under age, had had several months' experience in the defendant's shops, and was earning \$1.65 per day. The injury caused the amputation of the fourth finger and part of the palm; he was eight days in the hospital and was unable to perform labor for some months. *Held*, verdict for \$1,950 was not excessive.

Appeal from Lee District Court.—HON. HENRY BANK, JR., Judge.

WEDNESDAY, MARCH 10, 1915.

ACTION to recover damages for personal injury. Judgment for plaintiff and defendant appeals.—*Affirmed.*

J. E. Craig, for appellant.

Archer C. Miller, B. F. Jones and B. A. Dolan, for appellee.

WEAVER, J.—The defendant is a manufacturer of powder kegs and plaintiff was employed in its service. At the time in question, plaintiff was operating what is known in the record as a head cutting machine, and while thus engaged, his hand was caught and severely injured in the press or stamp with which the sheet-iron heads for kegs were cut out. This injury he attributes to the negligence of the defendant in providing for this work a machine so worn and out of repair that a slight jar or motion would "trip" it or set it in motion, thereby rendering it unsafe and dangerous, and that while plaintiff was working upon and about said machine and in the exercise of reasonable care on his own part (the machine being thrown out of gear and supposed to be safe) it was jarred into gear and into motion, causing the injury of which he complains. The defendant denies any negligence on its part, and alleges that plaintiff's injury was caused by his own contributory negligence. The answer further alleges that plaintiff assumed the risk incident to his employment and knew and appreciated the dangers of the work he undertook to do, and is, therefore, not entitled to recover. There was

a trial to a jury and verdict and judgment for plaintiff in the sum of \$1,950.

I. Error is assigned upon the ruling of the trial court in refusing to direct a verdict for the defendant. The grounds of the motion briefly stated were, that plaintiff had failed to

1. MASTER AND
SERVANT: neg-
ligence: volun-
teer: directing
verdict.
prove any negligence on the part of defend-
ant; that he knew the condition of the ma-
chine with which he worked and was guilty
of contributory negligence in using it; and
that he undertook to use the machine as a mere volunteer
without the knowledge or authority of his foreman.

There was no error in denying the motion, as none of the matters of fact therein stated and relied upon were admitted and none were established by undisputed evidence. There is evidence in the record tending to show that the machine was not and for a considerable period had not been in good order and was thereby rendered dangerous to the operator, also that plaintiff was authorized and directed by the foreman to use said machine and frequently did use it with both actual and implied consent of the foreman, and that he was not a mere volunteer. The truth of these things was for the jury to consider and determine, as was the further question as to whether plaintiff exercised reasonable care for his own safety.

II. Appellant also excepts to the failure of the court to charge the jury upon the law of assumption of risk as applied to the use of the alleged defective machine. Of this it must

2. MASTER AND
SERVANT: neg-
ligence: as-
sumption of
risk: pleading.
be said that the question of such assumption
of risk is not in the case. The defense of as-
sumption of the risk arising from a master's
negligence is an affirmative defense and to be
available must be pleaded as such. The assumption of risk
alleged in the answer in this case is expressly stated to be
assumption of the risks "incident to the plaintiff's employ-
ment." Such assumption is incident to the contract of em-
ployment and the servant, as a matter of law, assumes the
risks naturally and properly incident to the business or work
when conducted by the master with reasonable care for the

safety of his employees and does not include the risk, if any, arising from the master's failure to perform his duty. Such assumption does not need to be pleaded and its allegation in an answer adds nothing to the issues which is not raised by a mere denial. Assumption of the risk of the master's negligence is a different matter and must be pleaded to be of any avail. It is not pleaded in this case. We have had several occasions to discuss this subject, notably in *Martin v. Electric Light Co.*, 131 Iowa 724, and in later cases in which that precedent has been cited and followed. Therefore, the trial court did not err in failing to instruct the jury in this respect as requested by defendant.

III. Nor was there any error in refusing the third request of the appellant upon the subject of contributory negligence. In the 4th, 8th, 9th, 10th, 13th and 16th paragraphs of the charge given by the court on its own motion, the duty of the plaintiff to exercise reasonable care for his own safety and that any failure of duty on his part in this respect would defeat his alleged right to recover damages was stated, repeated and emphasized, and the giving of the additional instruction asked for by appellant was in no manner necessary to the proper direction of the jury.

IV. The same may be said of the point made by appellant that the court should have given an instruction asked upon the theory that plaintiff was a mere volunteer in the use of the machine and undertook to operate it without authority. Whether plaintiff was at work in the line of his duty or within the scope of his employment at the time of his injury was a matter of conflict in the evidence and therefore for the jury. The machine on which the plaintiff was injured was not the one on which he was regularly or most often employed. According to his testimony, it was a common habit or practice for him and another operator to change machines and this was done with the knowledge and approval of the foreman in charge. He also testified that the change on the day

3. TRIAL: instructions: refusal to give: issues otherwise covered: contributory negligence.

4. TRIAL: instructions refused: issues otherwise covered: volunteer servant.

of the accident was made at the foreman's direction. On this subject he was corroborated to a considerable degree by other witnesses. These statements were denied by defendant's witnesses, though the foreman admitted that he sometimes directed the boys to change or work at different machines. Upon this subject, the court charged the jury as follows:

"If the jury finds from the evidence that in working at and operating the machine at which the plaintiff was injured, he, the plaintiff, was not within the line or scope of his employment or duty, and that the plaintiff had never been directed, or requested by the foreman in charge of the keg shop in question to operate what is called a head cutting machine, but that he, the plaintiff, voluntarily worked at and undertook to operate the head cutting machine in question, and in doing so was injured, then plaintiff cannot recover, and if the jury so finds from the evidence, then it will be the duty of the jury to return a verdict in favor of the defendant, even though the jury finds that the defendant was guilty of negligence substantially as alleged by the plaintiff."

In our view this fairly and sufficiently states the law as applicable to defendant's theory of the facts. Some criticism is directed against the use of the word "never" in the quoted paragraph. It is apparently employed by the court in the sense of "not" and must have been so understood by the jury, and when so read it states the rule of law as strongly in defendant's favor as it was entitled to demand.

V. The court also instructed the jury as follows:

"15. If the jury finds from a preponderance of the evidence that the plaintiff was acting in the line of this duty and employment when he was injured, and that the defendant was guilty of negligence in the manner substantially as alleged by the plaintiff, and that such negligence, if any, was the direct or proximate cause of his injury, without any negligence on the part of the plaintiff contributing thereto,

5. TRIAL: instructions: "summing up": fact propositions.

then plaintiff would be entitled to recover, but otherwise not."

The appellant objects that the instruction directs a finding for plaintiff and implies that plaintiff was not a volunteer, was not himself negligent and that defendant was negligent, and also that the instruction denies the defendant the benefit of the defense of assumption of risk. Concerning the last proposition we have already held that the defense of assumption of risk is not tendered by the answer. The other objections raised are clearly untenable. The instruction is merely the usual and proper summing up in brief and intelligible form of the substance of the fact propositions which, if established by the evidence, will entitle plaintiff to recover, and without which he must fail—and these were that he was acting in the line of his duty when injured, that the defendant was negligent as charged, that such negligence was the proximate cause of the injury complained of and that plaintiff was free from contributory negligence. It would be difficult to state the fundamental propositions in the case more tersely or more clearly. The instruction in no manner ignores defendant's claim that plaintiff was a volunteer or was himself negligent. All those matters had been given to the jury under appropriate instructions and the paragraph which counsel criticises necessarily implies their proper consideration by the jury in reaching its conclusion whether defendant was negligent as charged, whether plaintiff was thereby injured, whether plaintiff was acting in the line of his duty and whether he was exercising reasonable care for his own safety. The exception to this instruction must be overruled.

Again counsel says the court placed too heavy a burden upon defendant when it charged the jury that it is the duty of an employer to furnish reasonably safe machinery and appliances for the use of his employees. The criticism here offered seems to be that the employer is bound only to the exercise of reasonable care in this respect. But the two forms of expres-

6. MASTER AND
SERVANT: care
required: in-
structions.

sion are only different words for the same essential principle. If reasonable care has been exercised to make the place of work or the machinery or appliances safe for the use of the employee, then such place and machinery and appliances are reasonably safe within the meaning of the law.

Further question is also raised that the court should have held plaintiff chargeable with contributory negligence as a matter of law because, when injured, he was attempting

7. NEGLIGENCE: customary way of doing act: contributory negligence per se. to clean or wipe the die of the machine with his hand instead of employing a stick with cotton waste, as defendant claimed was the proper method; but there was testimony tending to show that plaintiff was cleaning the die in the manner which was there customary and that the foreman had given instructions to brush or clean the die with the hand. It was, therefore, a jury question whether plaintiff was using reasonable care.

VI. Finally it is said the damages allowed are excessive. The plaintiff when injured was a young man under age, had several months' experience in the defendant's shops and was earning \$1.65 per day. His right hand was crushed in such a manner as to necessitate the amputation of the fourth finger and a part of the palm. He was eight days in the hospital and for several months was unable to perform labor. He suffered considerable pain. The injury is necessarily permanent, must naturally interfere to a greater or less extent with the use and efficiency of his hand and constitutes an ineffaceable disfigurement. Under such circumstances, we cannot say that a verdict for \$1,950 is so great or so unreasonable that the court should interfere with it.

8. DAMAGES: excessive verdict—\$1,950. Other questions suggested by counsel are, so far as material, governed by the conclusions we have already announced in the foregoing paragraphs. The record discloses no prejudicial error and the judgment below is therefore—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

OLIVE M. COFFIN, Extrx., Appellant, v. A. D. STRUTHERS,
Appellee.

CONTRACTS: Consideration—Failure of—Issuance of Stock Shares
—Cancellation. Entire failure of consideration for a contract
authorizes an entire cancellation of the contract.

PRINCIPLE APPLIED: Stock of a corporation engaged in
the sale of lightning rods was issued to a promoter of an in-
surance company, under an agreement that the insurance com-
pany would grant a 25 per cent discount on premiums on all
buildings rodded with the lightning rods of corporation issuing
the stock. The insurance company failed before it carried out
any part of its contract. In the meantime the promoter to
whom the stock was issued deposited the stock with one of the
stockholders of the issuing corporation as collateral security to a
loan. The failure of consideration appearing, the collateral
holder surrendered the stock to his company and it was cancelled.
Held, the cancellation was justified and the promoter had no claim
thereto.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

WEDNESDAY, MARCH 10, 1915.

SUIT to redeem certain shares of corporate stock alleged
to have been held by defendant as collateral security for a
loan; for an accounting and for judgment for the value of
the stock in the event it could not be returned to the plaintiff.
Defendant alleged that he at one time held the stock as col-
lateral to a loan; that the stock was never paid for, that the
consideration for the purchase thereof failed, and that said
stock was surrendered and cancelled. On these issues the case
was tried to the court, resulting in a decree dismissing the
petition, and plaintiff appeals.—*Affirmed*.

Ryan & Ryan and E. J. Clements, for appellant.

Clark, Byers & Hutchinson, for appellee.

DEEMER, C. J.—Prior to the year 1905, Dodd and Struthers was a corporation engaged in the manufacture and sale of lightning rods, with its principal place of business at Des Moines, Iowa, but doing a business in many states of the middle west. The stock of this corporation was held in equal amounts by West Dodd and A. D. Struthers, and save for its existence as a corporation, the business was carried on very much as if it were a partnership.

E. M. Coffin, now deceased, was an insurance man living in Omaha, Nebraska, and he with one Lynch organized an insurance company known as the National Mutual Fire Insurance Company of Omaha, Nebraska, Coffin being the president and manager, and Lynch the secretary. This company had been in business but a short time when Coffin and Struthers met, and had some negotiations looking to an arrangement whereby the insurance company would give a 25% discount on its insurance rates upon all property which was rodded with lightning rods made and sold by Dodd & Struthers. This agreement was to apply especially to all property located in the state of Iowa, although it also covered property located wherever Dodd & Struthers were selling their rods. At that time the insurance company had not secured the right to do business in Iowa or in many, if any, other states aside from Nebraska; and Coffin and Lynch undertook to procure the right to do business in Iowa and other states so as to be permitted to insure property therein.

In consideration of these promises, Struthers agreed to assign or to have issued to Coffin and Lynch certain shares of stock in the Dodd & Struthers corporation. In accord with this agreement, there was issued to E. M. Coffin, common stock in the Dodd & Struthers company to the amount of \$2,500.00, and preferred stock to the amount of \$5,000.00. This stock was issued in November of the year 1905, in two certificates—one for 50 shares of preferred stock, No. 300, and the other for five shares of common, No. 101, the only consideration for this stock being the agreements hitherto mentioned. Each of

these shares was assigned on the back thereof by E. M. Coffin to A. D. Struthers on July 29, 1907, and by Struthers, assigned without date to West Dodd. These shares appeared in the stock book of Dodd & Struthers and were each marked "Cancelled" in red ink across the face thereof.

Sometime in the year 1906 defendant, Struthers, purchased of the National Mutual Fire Insurance Company, a guaranty fund certificate of said company to the amount of \$3,500.00 in cash and at the same time the following agreement was entered into:

"Agreement between A. D. Struthers of Des Moines, Iowa, and the National Mutual Fire Insurance Company of Omaha, Nebraska; said Struthers has this day bought of National Mutual Fire Insurance Company, three thousand five hundred par value Guaranty Fund Certificate of said company, and pays in therefor \$3,500.00 in cash. It is therefore understood and agreed that said A. D. Struthers shall and will sell said certificate back to said company or assign it to whoever said company shall direct at any time on or before July 1, 1906; that said company shall pay to him in consideration therefor, the sum of thirty-six hundred and seventy-five (\$3,675) dollars, together with five per cent running interest on said thirty-five hundred dollars from this date to the date of its redemption, which they shall pay on or before July 1, 1906.

"Witness our hand this 22nd day of January, 1906.

"A. D. Struthers,

"National Mutual Fire Ins. Co.

"E. M. Coffin, President,

"J. L. Mabie, Secretary."

In lead pencil opposite the above signatures there is this writing: "Extended to November 1, 1907, at which time we agree to personally see this matter settled in full. . . ."

Coffin personally guaranteed that he would take up the certificates mentioned in this agreement. Dodd & Struthers

also invested something like \$2,000.00 more in the stock or guarantee fund of the insurance company, but this investment does not figure in the case.

In January of the year 1907, Coffin, who was then engaged in building a residence in Omaha, found that the building was costing more than he expected, and he applied to Struthers for a loan of \$3,000.00 with which to complete the building; proposing to pledge as security the stock which had been issued to him in the Dodd & Struthers corporation; and after some correspondence, Struthers finally made Coffin the loan, taking his note therefor, and Coffin assigned the stock to Struthers as security for the note.

The insurance company was unable to secure the consent of the proper authorities to do business in Iowa and in the other states contemplated by the parties, and in the fall of 1907, it got into financial difficulty and was finally closed up and prohibited from doing business in Nebraska or any other state. The Dodd & Struthers corporation never received any benefit whatever from the agreement of the insurance company to discount its premium rates and can never secure such benefits for the reason that the insurance company failed and never complied with its agreement and never took up the guaranty as it promised. Discovering this situation, Dodd & Struthers cancelled the stock, and in effect converted it into treasury stock.

Struthers at this time also became apprehensive about the security for his \$3,000.00 loan to Coffin, and he procured an attorney to go to Omaha to get additional security for the loan. This attorney went to Coffin and after considerable negotiations, both by the attorney and by Struthers himself with Coffin, Coffin finally made a demand note for \$3,000.00 and also a second or third mortgage upon his Omaha dwelling house to secure the note. The mortgages upon the house were foreclosed and as a result, Struthers received \$2,000.00 from the foreclosure sale, which amount he credited on Coffin's \$3,000.00 note. When Struthers' attorney met Coffin in

Omaha, he, Coffin, said to the attorney, that the Dodd & Struthers' stock was sufficient security for the \$3,000.00; but the attorney then and there said that the consideration for the stock had entirely failed, and that the stock had been cancelled and was no longer available as security. Coffin said in response that he was sorry that he and Lynch had been unable to carry out their agreement, and that they were unable to do so, although they acted in good faith; that they could not get into the state of Iowa and had been unable to carry out the agreement. The attorney was demanding the additional security for the \$3,000.00 because the stock had not been made good and Coffin finally acceded to the demand, and gave the security. Coffin also said to the attorney:

"He said he had had at one time \$7,500.00 worth of stock in Dodd & Struthers, Incorporated, which had been returned to them and which he had been able to give no satisfactory consideration for because of the failure of the company and because of his being unable to carry out the obligations of that company to do business in the State of Iowa and elsewhere where Dodd & Struthers were operating. He told me he wished he could have held that stock because he wanted to be associated with Dodd & Struthers in the future, thinking he might possibly have need of some employment on account of the failure of the insurance company. I stated that he said he was sorry or regretted that they were unable to carry out the agreement—same agreement they had in regard to a reduction of premium on insurance. He told me the company was in the hands of a receiver and was not doing any business."

Lynch, who, as we understand it, also received the same amount of stock in the Dodd & Struthers corporation as Coffin, afterward returned his stock to the company and it was cancelled.

The transactions with reference to the new security for the \$3,000.00 loan were begun by the attorney sometime in the

summer or fall of the year 1907, and concluded early in January of the year of 1908. Nothing further was done by Coffin with reference to this stock in the Dodd & Struthers company during his lifetime (he having died on Oct. 2, 1908); but sometime in the month of September, 1909, Mrs. Coffin, having been appointed executrix of her husband's estate, through her attorney went to Struthers, tendered the balance due on the \$3,000.00 note, and demanded the two certificates of stock. This demand was refused.

In the meantime, however, Struthers sold his stock and interest in the company of Dodd & Struthers to Dodd, and made an assignment of the stock issued to Coffin which had by him been endorsed to Struthers. This was done, so Struthers said, to convey the apparent legal title thereto to Dodd; the stock being in fact treasury or company stock. It is claimed that sometime in November or December of the year 1907, Coffin wrote Struthers the following letter:

“(Printed Headline ‘E. M. Coffin, Omaha, Nebraska,’ December 13, 1907.) Mr. Struthers:

“Have been ill for three or four days. Am confined to my room but doctor don't know I am writing you. Nearly all your comments in recent letter are unjust and erroneously stated by you concerning which I will write you soon as get on my feet. The home is new, completed within last ten months. For the lot (214) feet front building house and out buildings by day labor, I paid in spot cash from July, 1906, to September, 1907, \$24,460.00. Said figures do not include any raise in value of lot and two or three other things not counted. It is mortgaged for \$9,800.00. No lien for building. Everything paid for in cash. It would seem to me that if I pay up the interest on your money that the \$5,000.00 preferred and \$2,500.00 common stock total \$7,500 from all statements made to me when I took it ought to be good security for \$3,000.00 on an extension, but as I said, will give additional security on the home. My intention is to sell the home

at once and build less expensive property and pay up everything I owe. Have today placed it on the market but whether can get my asking price of \$24,500.00 before spring opens up, cannot tell so the note better be made on or before July 1, 1908; then just as soon as I sell before that time will pay it up. Your letter is the only unkind comment I have received during the past business difficulty but will not digress in this letter as I am not able to prolong it. Shall I draw the note and mortgage and send it? Thanking you in advance for this necessary considerate treatment I am, Very truly yours.

"E. M. Coffin, C. R. C."

The receipt of this letter is emphatically denied by Struthers and there is a decided conflict in the testimony regarding what was said in an interview between a son of E. M. Coffin and Struthers, had in Des Moines in November of the year 1908, and also as to what occurred at an interview between plaintiff's counsel and Struthers in the month of September in the year 1909. We shall not set forth the testimony of the witnesses. Suffice it to say that the matter of giving the security mortgage on Coffin's house for the \$3,000.00 note was closed sometime after the letter just quoted is said to have been written,—whether before or after the interview between defendant's attorney and Coffin at Omaha, is a matter of considerable doubt. We are disposed to think, however, that if written at all it was after the Omaha interview. This conclusion seems inevitable from the other correspondence. Plaintiff's contention is that defendant held and still holds the two

1. **CONTRACTS:**
consideration:
failure of: is-
surance of stock
shares: cancel-
lation.

certificates of stock as security for the balance due on the \$3,000.00 note, and for nothing else, and that having tendered the amount due on this note, she is entitled to a return of the stock; or in the event it cannot be returned, that she have judgment against the defendant for the face value thereof less the amount for which it is held as security.

On the other hand, defendant says that the consideration

for the stock failed; that the said stock was surrendered and cancelled to the Dodd & Struthers company; that while the stock was at one time held as security for the \$3,000.00 loan, it became worthless because the consideration therefor had failed, and that Coffin, recognizing this fact, gave the mortgage on his dwelling house as a substitute therefor, thus recognizing defendant's claim that the stock in the Dodd & Struthers company had been cancelled. While the arguments cover a wide field, the issues made by the pleadings are quite narrow, and resolve themselves down to a simple question of fact: Was there an entire failure of consideration for the Dodd & Struthers stock? and if so, was the said stock cancelled by agreement of the parties? or if not so cancelled, is defendant in equity entitled to have a decree of cancellation because of want or failure of consideration?

The only consideration for the issuance of the stock has already been stated and it is apparent that as a matter of fact, Dodd & Struthers never received any benefit therefrom. The insurance company was never authorized to do business in any state other than Nebraska, and as Coffin and Lynch knew, Dodd & Struthers had already sold that territory to another, and could not receive any advantage from discounts of insurance premiums in that state. The company never secured permission to do business in Iowa or other states where it would have been of advantage to Dodd & Struthers to have had the discount made in premium rates, and they received no benefit whatever from the Coffin promise and agreement. Both Lynch and Coffin recognized these facts, and Lynch surrendered his stock. Whether or not Coffin did so expressly is a matter of much doubt under this record, for he was endeavoring as best he could to hold on to the stock to the end; but he finally acceded to Struthers' demands bottomed on the idea that the stock was worthless, or had been cancelled, and gave the mortgage upon his dwelling house—impliedly recognizing the correctness of Struthers' claim. Aside from this, however, the case is in equity, and if the

defendant had the right of cancellation for failure of consideration, it matters not that the cancellation was not made with Coffin's consent. A court of Chancery will treat the cancellation as having been properly made, if in equity and good conscience there was reason for such cancellation.

A recitation of the facts is all that is necessary to demonstrate the equities of the case. To our minds, they justify the decree of the district court. We do not overlook the conflict in the testimony regarding what occurred between plaintiff's attorney and the defendant after the death of Coffin. About all that can be said of this is that someone is mistaken as to what took place. The trial court had the witnesses before it, and in effect found that there was nothing in this testimony which would justify a finding that the stock had not been cancelled or that defendant had no right in equity to treat it as cancelled. We are not justified in view of the entire record in coming to a contrary conclusion.

Appellant's motion to strike appellee's abstract is overruled. The decree must therefore be, and it is—*Affirmed*.

EVANS, LADD and GAYNOR, JJ., concur.

ANNA EVANS, Appellant, v. CITY OF DES MOINES, Appellee.

MUNICIPAL CORPORATIONS: Obstruction in Street—Notice,

- 1 **Knowledge, Responsibility—Failure to Show.** The existence of an obstruction in a public street does not, of itself, convict the city of negligence.

MUNICIPAL CORPORATIONS: Negligence—Obstruction in Street

- 2 **—Proximate Cause.** One injured by being hit by a barrel stave which a policeman kicked out of the street cannot predicate liability against the city on the theory that the city was maintaining an unlawful obstruction in the street.

Appeal from Polk District Court.—HON. CHARLES A.
DUDLEY, Judge.

WEDNESDAY, MARCH 10, 1915.

ACTION for damages for alleged negligence on the part of the defendant city in permitting an obstruction upon its streets whereby the plaintiff was injured. At the close of plaintiff's evidence there was a directed verdict for the defendant. Plaintiff appeals.—*Affirmed*.

Fred F. Keithley, for appellant.

H. W. Byers, Eskil C. Carlson, and E. M. Steer, for appellee.

EVANS, J.—The plaintiff was injured while standing on one of the defendant's streets upon the edge of the curb and in the business part of the city between Grand Avenue and Locust Street. The circumstances in brief were that she with many others was watching an oncoming parade headed by policemen walking abreast. As the head of the procession approached the place where plaintiff stood, one of the policemen kicked out of the way of the parade a barrel-stave there lying upon the street. The stave thus kicked struck the plaintiff upon the leg and caused her considerable resulting injury.

The theory of the plaintiff as a ground of recovery is that the city was negligent in permitting such barrel-stave as an obstruction upon its street and that such negligence was the proximate cause of the injury complained of.

1. MUNICIPAL CORPORATIONS: obstruction in street: notice, knowledge, responsibility: failure to show.

Her claim is not predicated upon the act of the policeman. She claims no negligence on the part of the policeman nor does she claim any liability of the city for the negligence, if any, of the policeman in kicking the stave. She contends that the act of the policeman was only a concurring and not an intervening cause. The first question which arises upon the record is: Was the charge of negligence supported by sufficient evidence to justify the submission of the case to the jury? The only proof made was that the barrel-stave was at that mo-

ment upon the pavement. Clearly this of itself did not prove negligence. Before the city can be held negligent for permitting an obstruction in its streets it must be shown either that it was responsible for the obstruction in the first instance or that it failed to remove the same with reasonable diligence after discovery or reasonable time for discovery. The evidence discloses nothing as to the length of time the street was in the condition complained of. For aught that appears the stave could have fallen from a garbage wagon within a brief time prior to the accident. The city is not an insurer of the safety of its streets. There was evidence that the stave was old and frayed and marked with wheel tracks. But this is entirely consistent with its previous location in any place,—alley, street or yard.

We think it clear that accepting all the evidence as true no negligence of the city was shown.

There is a further consideration here which bears both upon the negligence pleaded and upon the question of proximate cause. Granting that the stave was an unlawful obstruction of the street while it remained there, it was not as an obstruction to the street that it operated to the injury of the plaintiff. In view of our conclusion at this point we need not pursue further the question of proximate cause which is very ably presented in the briefs. For the reasons indicated, the order directing a verdict must be sustained.—*Affirmed.*

2. MUNICIPAL
CORPORATIONS:
negligence; ob-
struction in
street; proxi-
mate cause.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

IRMA H. HARRIMAN et al., Appellants, v. BOARD OF SUPERVISORS et al., Appellees.

DRAINS: Assessment of Benefits—Prior Drainage System—Adaptability for Lateral Tiling. In determining the assessment of benefits for a drainage improvement, due consideration should be given (a) to the system of drainage already provided by the landowner, (b) the relative amount of land actually drained by the new improvement, and (c) the extent the improvement affords outlet for lateral drainage. *Held*, assessment should be reduced one-third.

Appeal from Franklin District Court.—HON. R. M. WRIGHT, Judge.

THURSDAY, MARCH 11, 1915.

APPEAL from a decree confirming a special assessment.—*Reversed.*

John M. Hemingway, for appellants.

B. H. Mallory, for appellees.

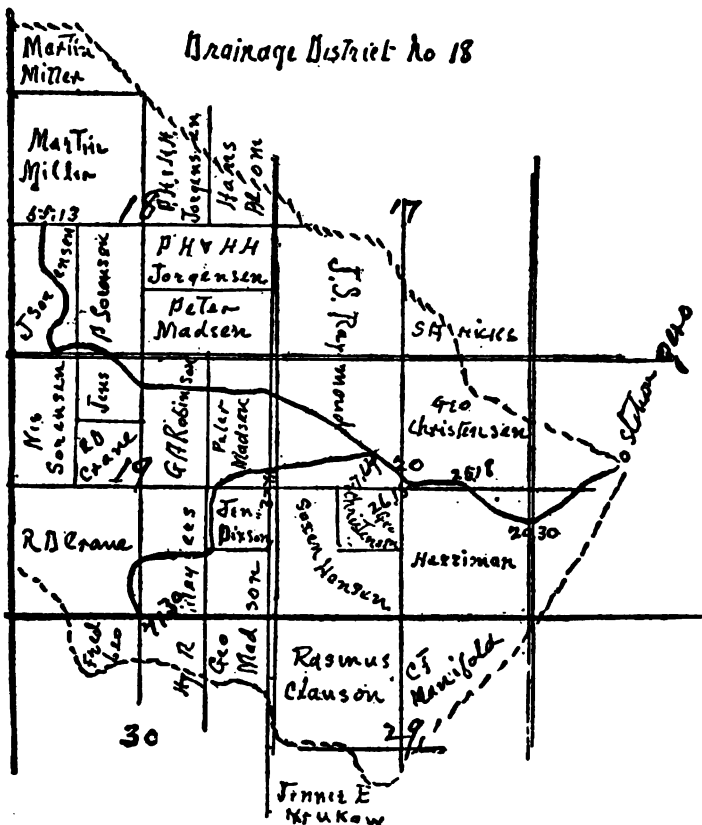
LADD, J.—Drainage District No. 18 of Franklin County has been established and the improvement completed. The cost was estimated at \$14,800 and of this \$1,195.28 was assessed against the two townships whose highways were drained or afforded outlets for drainage. The remainder was distributed among seventy-six forties. Appellants own the S. E. $\frac{1}{4}$ of Sec. 20, the several forties being assessed as follows:

N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	\$ 752.00
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	397.75
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	64.50
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	129.00

The appeal is from an order of the district court approving these assessments for that, as is contended, the apportionment was not according to the benefits received and exceeded such benefits. In order to pass on

1. DRAINS: assessment of benefits: prior drainage system: adaptability for lateral tiling.

this question, it will be necessary to describe the improvement somewhat in detail. To better understand the situation, a map of the system is attached.



The outlet is a creek and into it, somewhat north and west of the center of Sec. 21, empties the open ditch which extends in a southwesterly direction to the highway between

that section and the S. E. $\frac{1}{4}$ of Sec. 20, a distance of 2,500 feet. On the east line of the highway is the bulkhead at the end of the 24-inch tile. From this point, the tile drain extends northwesterly 1,800 feet through the land of appellants, which will be referred to as the Harriman land, to the quarter line and then a little north of this line westerly through the N. E. $\frac{1}{4}$ of Sec. 20, belonging to Geo. Christiansen, to the west line, or something over 1,100 feet. From this line, it extends into the land of J. S. Raymond, the N. W. $\frac{1}{4}$ of Sec. 20, nearly 900 feet, or 6,300 from the outlet to the junction with the lateral. This lateral extends to the southwest 8,127 feet and is of 16-inch tile. The main is of 20-inch tile from this junction to the northwest, a little over 10,000 feet. The grade of the main is .1 foot to the 100 feet for 6,000 feet from the outlet and .38 foot to 100 feet the remaining distance. The grade of the lateral is .1 foot for 100 feet for 4,000 feet and the rest of the way is .4 foot for 100 feet. Prior to the establishment of the district, what is known as a bull ditch had been excavated by F. A. Harriman, since deceased, and Raymond from the creek into Raymond's land along the course of the tile drain and they had paid the owner of the W. $\frac{1}{2}$ of Sec. 21 for damages consequent on excavating the same through his land. This was deepened from nothing to 2.4 feet from the bulkhead to the outlet, though the course was changed near the creek. From the bulkhead up, the tile was laid below the bottom of the ditch and this only filled up to its original depth and left open above to carry off the water. The cut at the bulkhead was 3.6 feet and 6.29 feet where the tile passed into the Christiansen land and was much greater beyond.

The ditch varied in width from $6\frac{1}{2}$ to $10\frac{1}{2}$ feet at the top and from 3 to 6 feet at the bottom and was from 2 feet 2 inches to 4 feet deep. As said, this was not filled but, as shown by the evidence, will gradually fill up, especially when the several farms are tiled into the main and lateral and cultivated. Whether the depression will be required to carry

off the surface water in event of unusual rainfalls is in dispute. That water in large quantities flowed down the ditch in the spring before the tiling had been completed does not necessarily prove that the open ditch will be necessary after the system is in operation and landowners have drained their land into it. The burden of this risk, however, is cast on the Harriman land. The ditch may have carried off the surface water before the tile was laid but not as quickly and completely as the tile drain. Moreover, the drain, when the land above is tiled, will extract the water from the soil down to the depth of the tile and obviate the seepage from such land. Tiling into the ditch as had been done on the west part of the Harriman land, though probably somewhat beneficial to the land, was not completely effectual in rendering it suitable for cultivation, owing to this seepage. True, practically the main advantage of the tile drain to the Harriman land was in carrying off the surface water and seepage from above; but until relieved of these, it could not be successfully drained. Considerable advantage also will be derived from the main tile in draining, for it will seldom be full and will serve about the same purpose as a small tile laid at the same depth as its top is from the surface. As laterals should enter at or near the top, it is apparent from the depth of the cut through the Harriman land that difficulty will be experienced in getting sufficient fall by connecting any of these with the main. The only safe method, according to the evidence, will be to extend the tile draining the north eighty south of the main to the bulkhead, allowing the water to flow directly into the open ditch. The south eighty acres must be drained into the open ditch if at all. On the other hand, the cut or depth of tile in the other tracts is such that all of these can be drained through laterals into the tile drains of the system, thereby avoiding the expense appellants must incur in reaching an outlet. Moreover, those on which the assessments are about the same or higher derived a far greater benefit from the drainage afforded by the system. Thus in the N.

W. $\frac{1}{4}$ of Sec. 20, there were 5,650 feet of tile and the assessments,

N. E. $\frac{1}{4}$	\$ 365.50
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	666.50
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	774.00
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	1,075.00

The NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 19 had 1,400 feet of tile in it and was assessed \$978.25. These sufficiently illustrate the point. And the tile in both these tracts was laid at a depth so as to be available as outlets for laterals. What then are the benefits of the system to the Harriman land? Of course, it had the advantage of the ditch before the tile was laid and that carried off the surface water and (1) the only benefit of the tile drain was in carrying it off quicker; (2) it took care of the seepage; (3) the ditch from the bulkhead was deepened and the water from the tile drain likely will keep it clean, making it somewhat better as an outlet than the original ditch, though much evidence is to the contrary, and the burden of keeping it open is on the district; (4) the main tile will drain a small area on each side of it through this land and on the south side of it after it enters Christiansen's land.

A possible disadvantage is suggested in that the high water mark of the creek reaches the Harriman land and it is said that when this occurs, water will be held back in the tile, seepage from which will reach the soil. This might happen for a short time; but if so the soil would likely be so saturated with water as not to be injuriously affected thereby. The only possible benefit the south forties could derive from the improvement is the care taken of the seepage and the deepening of the ditch, and keeping it clear. Even this was not essential to drainage into it, for it was already deep enough to carry off the water which might be drained from these forties. The cost of deepening was \$250, but the owner of the land claimed damages for the additional servitude,

and these were assessed at \$500, with expenses for ascertaining, amounting to \$175. Manifestly, no part of this expense, aside from the deepening, should have been assessed against these tracts, for the right to drain them through Sec. 21 had previously been acquired by appellants' decedent. But these were assessed at \$193 or nearly as much as deepening the ditch cost. The topography was such that neither would suffer much from seepage and the assessment was clearly out of proportion to the benefits. The same is true of the north forties. The appraisers in estimating benefits divided the tracts into swamp, wet, low and high and then made corrections because of distance from the drain and computed accordingly. They should also have taken into consideration the relative amount actually drained by the improvement and to what extent it afforded an outlet for laterals. As seen, it is not available for that purpose for appellants' land, which must be drained into the open ditch, the right to use which appellants already enjoyed. These matters seem to have been overlooked or else accorded too little significance. In what amounts the assessments should be reduced it is difficult to determine with any degree of accuracy. From a comparison with those levied against other lands and the topography of the several tracts in so far as appears from the tables before us, we are satisfied that the assessments against appellants' several forties should be reduced at least one-third and such will be the order of this court.—*Reversed.*

DEEMER, C. J., GAYNOR and PRESTON, JJ., concur.

WILLIAM PLATT, Appellee, v. AMERICAN CEMENT PLASTER
COMPANY, Appellant.

RELEASE: Negligence in Signing—Estoppel to Repudiate. One may
1 be so negligent in signing a release of a valuable right that
he will be estopped thereafter to assert (a) that it was not
such a writing as he intended to sign, or (b) that it does not
express the intention of the parties, or (c) that it was ob-
tained by fraud.

TRIAL: Instructions—Assumption of Fact—Signing Release. In-
2 struction covering the circumstances which might excuse one in
signing a release without reading, reviewed, and held not to be
guilty of the vice of assuming the truth of facts in issue.

RELEASE: Right to Rescind—Mutual Mistake—Fraud—Personal
3 **Injury.** Mutual mistake may be sufficient to avoid a release
of a personal injury claim—for instance, that the payment
was intended as payment of wages only.

Appeal from Webster District Court.—HON. R. M. WRIGHT,
Judge.

THURSDAY, MARCH 11, 1915.

ACTION at law to recover damages for injuries received
by plaintiff while in defendant's employ in a stucco plaster
mill. Trial to a jury. Verdict and judgment for plaintiff
and defendant appeals.—*Affirmed.*

Parker, Parrish & Miller, for appellant.

Kenyon, Kelleher & O'Connor, for appellee.

DEEMER, C. J.—Defendant is engaged in the manufac-
ture of stucco plaster, and at the time in question was operat-
ing a mill near Ft. Dodge. Plaintiff was in its employ and
was hired to do the work of mixing and sacking the plaster.
He had never worked about the grinders, nor was he employed

to shift belts or look after pulleys or shafts. These parts of the machinery were located in defendant's mill upon another floor from the one where plaintiff was employed.

On the day of the accident and a few minutes before it occurred, defendant's superintendent, finding that an employee having charge of the belts and pulleys was or was about to be absent from his place, called plaintiff away from his regular work and directed him to watch the belts on the floor below where he was working, and if any of them came off to go down and put them on. Shortly thereafter, a belt came off and pursuant to instructions, plaintiff went below and undertook to replace it; and in the act of so doing his clothing caught upon a pulley or shaft which was revolving at a speed of about 97 to the minute, and he, plaintiff, was severely injured on his arms, leg, and body, by being wound around the shaft and thrown against planks and lumber, both below and above the shaft. The machinery was stopped as soon as possible and plaintiff removed from his position by cutting off his clothing which had become fastened either to the shaft or to a pulley thereon.

At that time he, plaintiff, was unconscious, and he does not know just how the accident occurred. Some of the bystanders testified, however, that his jacket was caught by a set screw on the collar that held the shaft in position, and that this set screw stuck out from the pulley an inch or three quarters of an inch. There was also testimony to the effect that this set screw had been exposed for some time prior to the accident.

Plaintiff knew nothing of the set screw and was not informed of the hazards incident to the replacement of the belt. The extent and seriousness of plaintiff's injuries were not known until some time after the accident. The negligence charged was: first, the ordering of plaintiff to work in a more hazardous place than that in which he had been employed, without warning him of the dangers incident thereto; second, permitting the set screw to remain unguarded;

and third, failure to furnish proper tools and implements as belt shifters.

Defendant denied the alleged negligence; pleaded that it had covered the set screw with plaster or cement and did not know that it had become exposed prior to the accident; that plaintiff knew as well as it did of the exposed condition of the screw and assumed the risk incident to work around it; and also pleaded a full settlement, accord, and satisfaction for the injury, evidenced by a receipt and release of which the following is a copy:

"I, W. H. Platt, hereby admit and acknowledge that there has been paid to me in hand this day by the American Cement Company the sum of seventy-five and no/100 dollars, and Doctor Bowen's bill \$35.00, and hospital bill \$21.58, in full settlement accord and satisfaction of any and all claims or demands of every description which I now have or may hereafter have against the said The American Cement Plaster Co. on account of an accident causing injury to me on or about October 26th, 1910.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 12th day of November, 1910.

"W. H. Platt, (Seal)

"Witnesses:

"George Wittman, 1726 13th Ave. So.

"C. Woodbridge."

Plaintiff in reply pleaded that this receipt and release was given simply as a receipt for five weeks' wages at the rate of \$15 per week, and that he did not know when he signed it that it was other than a receipt for such wages given for the estimated time which he was expected to lose from his work on account of his injuries. He also pleaded that said receipt and release was procured from him by fraud and misrepresentation at a time when he was suffering from great pain and while in an enfeebled and weakened condition; that it was represented to him that the money was paid him simply

for time lost and was not intended as a full settlement of his claim; that he did not know the terms or conditions of the paper; that it was represented to him by the person who took the receipt that he would be completely recovered and fully able to do his accustomed work within five weeks, which he believed to be true and upon which he acted, and that as a matter of fact, said statements were untrue. He tendered back the amount paid him by defendant and also offered to refund any amount it had paid to doctors or as hospital bills.

These were the facts and issues upon which the case was tried, resulting in a verdict for the plaintiff in the sum of \$2,000.00.

I. Several propositions are relied upon for a reversal; the first being that there is no testimony to show that defendant was injured by reason of an unguarded set screw. We think there was such testimony and although the witnesses disagree as to just where the set screw was, there is ample testimony to the effect that when plaintiff was removed from the shaft, his jacket was found fastened to the set screw and wrapped around the shaft or pulley. While there were several ways in which plaintiff's clothing might have been caught by the shaft, a jury may well have found that it was by the unguarded set screw. Again, there was sufficient testimony to justify a jury in finding that the set screw was either improperly guarded by the use of cement, held in place by a cloth wrapped around the pulley or shaft; or that this guard had come off a sufficient length of time before the injury so that defendant in the use of reasonable care should have remedied the defect. These were both jury questions and there was no error in submitting them to that body. *Stephenson v. Tile Co.*, 151 Iowa 371; *Lunde v. Packing Co.*, 139 Iowa 688; *Lehman v. Minn. Ry. Co.*, 153 Iowa 118; *Brownfield v. Ry. Co.*, 107 Iowa 254, 258.

II. Instruction No. 8, given by the trial court, reads as follows:

"If you find the above things to have been established by a preponderance of the evidence, and you further find that a reasonably careful and prudent man, situated as plaintiff was at the time he signed the said release, *might, while acting as a reasonably prudent man, have done* just as plaintiff did, and might while acting as a reasonably prudent man have signed just such paper as plaintiff did sign; and you further find that plaintiff has returned or offered to return the money he received on his account, then if plaintiff has established the foregoing facts by a preponderance of the evidence, you would be justified in finding that said release or receipt is void and of no effect; but unless plaintiff has so established said facts by a preponderance of the evidence, then said release would not be void, but would be binding upon plaintiff, and you should return a verdict for the defendant."

1. RELEASE: negligence in signing: estoppel to repudiate.

The italicized portion of this instruction is complained of. The only relevant exception taken to the instruction before it was read was in this language:

"The defendant further excepts to said instruction for the reason that therein the jury are told that if they 'further find that a reasonably careful and prudent man situated as plaintiff was at the time he signed the release might have done just as plaintiff did, and might have signed just such a paper as plaintiff signed.' This is erroneous and misleading and does not state a correct proposition of law, because the jury might conclude from the paragraph quoted, that if a reasonably careful and prudent man might have done just as plaintiff did, then they would be warranted in finding for the plaintiff. A reasonably careful and prudent man might have done just as plaintiff did; yet it is not the law that such would be an excuse for the signing of the written instrument without reading or having it read, or ascertaining its contents. It is an incorrect statement of law. The law requires a party when there is nothing to prevent his read-

ing or ascertaining the contents of an instrument, to read or ascertain its contents, and it is not a question of degree of care, nor a question whether an ordinarily prudent man might have done as plaintiff did, and the instruction is therefore erroneous, does not state the law correctly; it is misleading and confusing."

It will be noticed that this is not predicated upon the misuse of the italicized words, but upon the proposition as a whole; and no suggestion was made that the test was not

2. TRIAL: Instructions: assumption of fact: signing release. what a reasonably careful and prudent man *might* have done, but what he *would* have done. Assuming then that the instruction is

the equivalent of one stating that the test was what a reasonably careful and prudent person would have done, we think there was no error prejudicial to the appellant. One may be precluded by his negligence from asserting that an instrument such as the one here involved, was not such an one as he intended to sign, and that it does not express the true intent of the parties or was obtained by fraud; but what amounts to negligence, creating such an estoppel, is a question for the jury; and if that be true, appellant cannot complain if the test is made,—what a reasonably prudent and careful person would do under like circumstances. *U. P. R. R. Co. v. Harris*, 15 S. C. Rep. 843; *Hopkins v. Ins. Co.*, 57 Iowa 203; *Shores-Mueller Co. v. Knox*, 160 Iowa 340.

III. Instruction No. 9, given by the trial court, was as follows:

"A man in health and accustomed to the transaction of business, in executing such paper as that offered in evidence in this case, would not be at liberty to deny his knowledge of its contents. But one in the situation the plaintiff was in, lying on his bed, if he was lying on his bed, prostrated and distracted by the pain which came to him from the injury he received, if he was so distracted, might under such circumstances, if you find the same have been proved, as are set forth

in instruction No. VIII, be excused from reading it, if in fact he did not read it, or from having the same read to him if he did not have it read. He may be excused because he was in such pain, agony and misery; but if he understood what he was doing, and understood that he was making a settlement of the whole business, of the entire matter between himself and the defendant, then he would be bound by the settlement without regard to the amount of money which he received. If the settlement was made with the full understanding of the rights of the parties, plaintiff then being in such a state of health and mind as to enable him to transact such business, then you should say that the settlement is binding upon the plaintiff, and he is concluded in this action, and you need make no further inquiry in respect to it; that is to say, his suit in this case cannot be maintained, and your verdict should be for the defendant."

This is challenged because it is said to assume certain facts to have been proved. We do not so understand the instruction. It merely stated what plaintiff claimed the facts to be and left it to the jury to say which of these facts, if any, were proved. Whilst the instruction is somewhat out of the ordinary, yet courts are not required to use any stereotyped forms. See the *Harris* case, *supra*.

The defendant's view of the case in this respect was fully covered by other instructions, notably X½ and XIII. and we see no error here.

VI. Appellant's main stress is upon the proposition that the settlement and release were and are binding upon plaintiff and that he is not entitled to recover in the face of this release. Plaintiff, while admitting the signing of the receipt, says that it was not given in settlement of his entire claim; but simply for five weeks' wages and that he signed the paper without knowing that it was anything other than a receipt for this amount. He also pleaded fraud and

3. RELEASE: right
to rescind:
mutual mis-
take: fraud:
personal in-
jury.

mistake in the making of the settlement, and his enfeebled condition of mind and body.

If the jury believed the testimony that the receipt was simply to cover the five weeks' wages, and plaintiff is excused for signing the paper, then under our holdings, the release is no defense. That question is set at rest by the recent case of *Reddington v. Blue & Raftery*, 168 Iowa 34. See also *Stomne v. Produce Co.*, 108 Iowa 137; *Whitney & Starrett Co. v. O'Rourke*, 50 N. E. 242; *Rauen v. Prudential Ins. Co.*, 129 Iowa 725. Again, a jury was justified in finding that defendant's agent who took the release did not correctly state to plaintiff what the physician had told him, but put it in other language of a different meaning, and misrepresented the character of the paper which he induced plaintiff to sign. These were all jury questions, the evidence being somewhat conflicting, and the verdict is conclusive.

No prejudicial error appears and the judgment must be and it is,—*Affirmed*.

LADD, EVANS and PRESTON, JJ., concur.

SIMON E. THOMAS, Administrator, Appellee, v. ILLINOIS
CENTRAL RAILROAD COMPANY, Appellant.

NEW TRIAL: Motion Assigning Several Grounds—Sustained Generally—Effect. The granting of a new trial generally under a motion assigning several grounds therefor will not be disturbed if any of the grounds are tenable.

NEW TRIAL: Granting by Trial Court—Reluctance to Overturn. It must be a clear case, indeed, to warrant the appellate court in overturning the action of the trial court in granting a new trial, especially when the reason assigned is that the verdict is contrary to the evidence.

NEW TRIAL: Instructions Not Submitted to Counsel—When Objection Timely. An objection to an erroneous instruction, not submitted to counsel before being read, as required by Sec. 3705-a, Sup. Code, 1913, is timely if made for the first time in a motion for new trial.

NEW TRIAL: Inherent Power of Judge to Grant. A "new trial"

4 may be ordered by a trial judge by virtue of his inherent power, even though our statute provides a procedure for the granting of new trial "on the application of the party aggrieved." (Sec. 3755, Code.)

RAILROADS: Negligence—Crossing Accident—Guest Relying on

5 Driver—"Look and Listen" Rule. The standard of reasonable care required of a mere *guest*, in approaching a railroad crossing, and riding in a conveyance on the invitation of another, may be and ordinarily is markedly different than the standard required of the driver over whose actions the *guest* has no control. The *guest* may have the right to rely on the driver "to look and listen." Material considerations are (a) the position of the guest in the conveyance, (b) whether the guest participated in the negligence of the driver, and (c) whether the driver was known to be incompetent, etc.

Appeal from Webster District Court.—HON. C. E. ALBROOK,
Judge.

THURSDAY, MARCH 11, 1915.

ACTION at law to recover damages for the death of Flossie Mericle, due to the collision of an automobile in which she was riding, with a passenger train on defendant's road. The case was tried to a jury, resulting in a verdict for defendant, which on plaintiff's motion was set aside, and a new trial granted, and defendant appeals.—*Affirmed*.

M. J. Mitchell, and *Helsell & Helsell* (*Blewett Lee* and *W. S. Horton*, of counsel), for appellant.

Healy, Burnquist & Thomas, for appellee.

DEEMER, C. J.—The negligence charged was the dangerous and excessive rate of speed of the train; failure to maintain gates or to have a watchman at the crossing where plaintiff's intestate was killed; the maintenance of a defective approach and grade to the crossing; failure to sound the bell or blow the whistle of the engine as it approached the

crossing; and the placing of cars upon a side track, so as to obstruct the view of an approaching train.

Defendant admitted the collision and the death of Miss Mericle, but denied each and all the allegations of negligence. The trial court submitted but two of the alleged

1. NEW TRIAL: motion assigning several grounds: sustained generally: effect.

grounds of negligence, to wit: the excessive rate of speed of the train, and the alleged failure to sound the bell or blow the whistle as the engine approached the crossing. As already stated, the verdict was for the defendant, and plaintiff filed a motion for a new trial based upon twenty-eight or more grounds. The trial court, while pointing out in its ruling several specific reasons for granting the motion, sustained it generally and did not overrule any of the grounds stated as a basis for the motion. In this state of the record, it is the rule of this court not to disturb the ruling if any of the grounds were tenable. *Van Wagenen v. Parsons*, 106 Iowa 263; *Holman v. R. R. Co.*, 110 Iowa 485; *Boyd v. Tel. Co.*, 117 Iowa 338.

One of the grounds of the motion was that the verdict was contrary to the evidence; and the court indicated in its ruling that this ground was well taken. Such being its hold-

2. NEW TRIAL: granting by trial court: reluctance to overturn.

ing, appellate courts are loath to interfere, for the trial court is vested with a large discretion in such matters and it is its duty to interfere whenever it believes that injustice has been done. As said in many of our cases, "it must be a clear case indeed to warrant an appellate court in interfering with its action." *Moran v. Harris*, 63 Iowa 390; *Morgan v. Wagner*, 79 Iowa 174; *Hopkins v. Knapp*, 92 Iowa 212; *Holman v. R. R. Co.*, *supra*; *Maynard v. City*, 159 Iowa 126; *Eggert v. Interstate Co.*, 146 Iowa 481; *Royer v. Plaster Co.*, 147 Iowa 277; *Holland v. Kelly*, 149 Iowa 391; *Andrews v. R. R. Co.*, 151 Iowa 166; *Crider v. McColley*, 154 Iowa 671; *Porter v. Bank*, 155 Iowa 617; *Post v. Dubuque*, 158 Iowa 224; *Smith v. Smith*, 160 Iowa 111; *Woodbury County v.*

Dougherty, 161 Iowa 571; *Werthman v. R. R. Co.*, 128 Iowa 135; *Van Wagenen v. Parsons*, 106 Iowa 263.

It is useless to do more than cite these cases, for they so firmly establish the rules stated that quotation therefrom would serve no purpose. Appellant does not argue many of the propositions involved in the motion for a new trial, and we might stop here with the remark that we are not required in the absence of argument to find that each and all of the grounds for the new trial were not tenable. The nature of the argument is such, however, that we have concluded to refer to some of the specific propositions involved. The trial judge in giving the reasons for his conclusion stated that in his judgment instructions Nos. 5, 8, X, Xa, XI, XIa, Xb, given to the jury, were erroneous or misleading; and that another which he had prepared and submitted to counsel for defendant and which was seriously objected to by them, and which was for that reason not given, should have been included in the charge and read to the jury. Instructions Xa, XIa, and XIb were read to the jury without being submitted to plaintiff's counsel, and were not read by them until after they were given to the jury, and they had no opportunity to object or to except thereto. They did complain of them in the motion for a new trial, and the trial court thought the complaints were good. Chap. 289 of the acts of the 35th G. A. provides that—

“All requests for instructions must be presented to the judge before the argument to the jury is commenced and before reading his charge to the jury. The judge, before reading his charge to the jury, shall present all instructions to counsel on either side, each of whom shall have a reasonable time in which to examine the same. All objections or exceptions thereto must be made before the instructions are read to the jury and must point out the grounds thereof specifically and with reasonable exactness; but upon a show-

8. NEW TRIAL:
instructions
not submitted
to counsel:
when objection
timely.

ing in a motion for a new trial that an error in such instructions was not discovered by the party claiming the error at the time of trial, such objections or exceptions may be made in the same manner in such motion for a new trial and no other objection or exception to the instructions shall be considered by the supreme court on appeal, except those made as above provided. The objections or exceptions must point out specifically the exact grounds thereof, and no other objections or exceptions shall be considered by the trial court upon motion for a new trial, or otherwise, or by the supreme court upon appeal."

It is quite clear that even under this provision counsel may object and except to instructions given by a trial court in a motion for a new trial, whenever the trial court denies them the right to see the instructions before they are read to the jury; and it is also clear that if the trial court is led into an error by counsel's objections to an instruction which it proposes to give, it may correct that error on motion for a new trial; and to our minds it is equally clear that notwithstanding the statute quoted, the court has inherent power to order a new trial for any palpable error committed by it, or by the jury, even in the absence of a motion for a new trial.

The judge is something more than a mere moderator. He has certain duties to perform and when convinced that errors have been committed, which resulted in a palpable miscarriage of justice, it is his province, as well as his duty, to interfere and to grant a new trial. *Hensley v. Davidson*, 135 Iowa 106; *Allen v. Wheeler*, 54 Iowa 628. See also *Forbes v. Ins. Co.*, 59 N. E. (Mass.) 636; *Ft. Wayne & B. I. R. Co. v. Donovan*, 68 N. W. (Mich.) 115; *Willmar Bank v. Lawler*, 80 N. W. (Minn.) 868; *Weber v. Kirkendall*, 63 N. W. (Nebr.) 35; *Ellis v. Ginsburg*, 39 N. E. (Mass.) 800.

In *Allen's* case, *supra*, this court said: "Having found that the instruction above set out was correct, and the first

4. NEW TRIAL:
inherent power
of judge to
grant.

verdict having been in plain violation thereof, it was the duty of the court to set the verdict aside. The appellant insists that the court could not do this on its own motion, because Sec. 2837 of the Code provides that a verdict may be vacated 'on the application of the party aggrieved.' This does not provide that the court may not upon its own motion, and for error which is apparent, set aside a verdict. Such power exists at common law, and we do not understand that any provision of our statute is a limitation of the power of the court on its own motion to compel juries to observe and follow the law as embodied in the instruction given by the court."

And in *Hensley's* case, *supra*, we said: "Our statute enumerates the grounds on which new trials shall be granted on application of the aggrieved party. Sec. 3755, Code. But there is no provision in the Code relating to orders of this kind on the court's own motion. That such right exists, however, is indisputable. It is one of the inherent powers of the court essential to the administration of justice. In *Rex v. Gough*, 2 Doug. 791, Lord Mansfield declared that, even though too late for a motion, if enough appeared, the court could grant a new trial, and in *Rex v. Atkinson*, 5 Term. R. 437, note, is quoted as saying that, though too late for a motion, 'if the court conceive a doubt that justice is not done, it is never too late to grant a new trial.' In *Rex v. Holt*, 5 Term. R. 436, Lord Kenyon said he well remembered *Rex v. Gough*, 'where the objection to the verdict was taken by the court themselves,' and Buller, J., observed, in concurring, that 'after four days the party could not be heard on motion for new trial, but only in arrest of judgment; but if, in the course of that address, it incidentally appears that justice has not been done, the court will interpose of themselves.' In *Weber v. Kirkendall*, 44 Neb. 766 (63 N. W. 35), it is said that the power of courts of general jurisdiction, in the correction of errors committed by them, 'is exercised, not alone on account of their solicitude for the rights of litigants, but

also in justice to themselves as instruments provided for the impartial administration of the law.' And such is the view generally entertained by the courts in this country. *Allen v. Wheeler*, 54 Iowa 628; *Ellis v. Ginsburg*, 163 Mass. 143, (39 N. E. 800); *Stanard Milling Co. v. White Line Transit Co.*, 122 Mo. 258 (26 S. W. 704); *State ex rel. Henderson v. McCrea*, 40 La. Ann. 20 (3 South. 380); *Bank of Willmar v. Lawler*, 78 Minn. 135 (80 N. W. 868); *Com. v. Gabor*, 209 Pa. 201 (58 Atl. 278); *Thompson, Trials*, 2411; *State ex rel. Brainerd v. Adams*, 84 Mo. 310.

"In the last case the court, in upholding the power pertinently inquired: 'If the court commits a palpable error in an instruction to the jury, or witnesses misconduct of members of the jury, which, on motion, would authorize it to set aside the verdict, shall it on account of the ignorance or timidity of the aggrieved party which prevents him from moving in the matter, render an unjust judgment on the verdict? If the jury find a verdict palpably against the law as declared by the court, is it powerless to maintain its own dignity and self-respect, unless someone who feels aggrieved shall move in the matter?' "

We may also note that as to some of the instructions given by the trial court, viz.: 5, 6, 8, and 10, a showing was made that the errors were not discovered until the motion for a new trial was made, and the alleged errors and exceptions are therein pointed out. With these matters out of the way, we come now to some of the grounds which it is claimed justified the ruling of the trial court in granting the motion for a new trial.

Plaintiff's intestate, a young lady twenty-one years of age, received an invitation from one Webster to take an automobile ride with him. She accepted and the two with another man by the name of Butler got into the machine, (Webster driving) and started on their trip. They proceeded on their way, and while traveling at a slow rate of speed in a northerly direction through the town of Duncombe, came to

the defendant's railway crossing, and while attempting to cross it, were struck by a train on defendant's line of road, running at a speed estimated by some of the witnesses at more than a mile a minute. At the place where the accident occurred, there are two street crossings over the defendant's tracks, the easterly one being the place of collision. The town is a small one, the greater part of it being on the south side of the railway tracks, and the buildings along the streets and a tile yard and other structures obscured the view of a train coming from the west on defendant's track, which ran approximately east and west through the village. These also interfered somewhat with the sound of an approaching train. It is claimed and testimony was adduced to show that, on account of these obstructions, a train could not be seen approaching from the west until it was within 220 feet of the crossing. At one point about 129 feet south of the crossing, a train might be seen 350 feet away from the crossing. The railway track was higher than the street, and there was a dirt approach thereto, 53 feet in length, having a grade of 3 feet. The crossing was rough, and there was but one plank between the rails, the balance of the space having been filled with cinders, which had settled below the rails and the board.

The accident happened about 10 P. M. and no one saw it, or is able to tell just how it occurred. Webster was at the wheel, and had control of the machine; and as a result of the collision, all the occupants were killed. After being struck by the train, none of them regained consciousness. How the occupants were seated in the automobile, the record does not distinctly disclose; but it does appear that the machine was a double-seated car. There were no gates at the crossing, nor was any watchman employed; and the train which struck the machine was not scheduled to stop at the town. It was one of the defendant's fast passenger trains; and ordinarily ran at a high rate of speed. As there were no eyewitnesses, the presumption that all the occupants of the car were in the exercise of due care obtained, but the

question of Miss Mericle's contributory negligence was submitted to the jury by the following instructions:

"Inst. VIII. If you find that defendant was guilty of one or more of the acts of negligence charged as specified in these instructions, and that such negligence was the direct

5. RAILROADS:
negligence:
crossing acci-
dent: guest
relying on
driver: "look
and listen"
rule.

cause of the injury of which plaintiff complains, you will next inquire whether or not plaintiff's intestate was guilty of contributory negligence. It was the duty of the said

Flossie Mericle, in approaching said crossing, to look and listen for approaching trains. The care required of her in this respect was the care which would be exercised by the ordinarily prudent person under such circumstances, having in mind the character of the crossing as known to her, or as should have been known to her by the exercise of ordinary care, the schedule of trains, if known to her, the mode by which she was traveling, the difficulties, if any, to see and hear approaching trains, the duty imposed upon defendant to give timely and adequate warning on approaching crossings, and all other matters shown in evidence which would be considered by the ordinarily prudent person under such circumstances; and if, under the circumstances, you believe that she did exercise ordinary care, then she was not guilty of negligence; but if, from all the circumstances, you do not find that she exercised ordinary care, then she was negligent, and if such negligence in any manner contributed to her injury then plaintiff cannot recover in this case.

"Inst. X. It is the law, that where one approaches the crossing of a railroad track upon which there is coming a train or engine that is liable to reach the crossing before a traveler on the highway can safely pass to the other side, and without looking or listening to discover the train, such person without any intervening circumstances which may reasonably operate to distract his attention, goes forward and is injured then he is guilty of contributory negligence and cannot re-

cover. It is the duty of a traveler on a public highway, in approaching a railroad crossing for the purpose of passing over the same, to look and listen for approaching trains, and to do such acts as a reasonably prudent person would do under the same circumstances. And if the conditions are such because of obstructions which hide the view, that a reasonably prudent person would stop and look and listen under such circumstances, then it is the duty of such traveler to stop and look and listen.

"In other words, if, in approaching the crossing, there are intervening objects which interfere with the sight and hearing of the person approaching the crossing in their efforts to determine whether there is a train coming upon the track or not, then such person should use reasonable caution commensurate with the difficulties and dangers involved.

"X-a. You are told, as a matter of law, that where the situation and surroundings are without controversy shown to be such that, had a person looked in the direction of an approaching train, such person could not have failed to see it and testimony or presumption that such person did look and did discover, raises no issue from which a party is entitled to demand a verdict. Therefore, you are told that if, under the evidence, you find that there was a reasonable distance in approaching the crossing within which Flossie Mercie could have looked or listened and known of the approaching train, the evidence of any person, or the presumption existing, if any did exist, that she did look and listen would not raise an issue upon the question as to the physical facts of the situation, and physical surroundings, if without controversy, would control as against evidence of looking and listening, or presumption of looking and listening, and such evidence or presumption would raise no issue upon which a party would be entitled to demand a verdict.

"XI-a. The duty of one approaching a railroad track, where there is restricted vision, is to look and listen. If necessary, to stop to determine whether or not a train is ap-

proaching and to do so at a time and place where stopping and where looking or listening will be effective and this is a positive duty and is required by law. If one listens and looks where it would serve no purpose to do so, such is not reasonable care and where one has a chance to see and to determine and to avoid the injury, and does not do so, such person would be guilty of contributory negligence.

"XIV. If you find that the decedent, Flossie Mericle was, at the time of the collision complained of, riding with the occupants of the car, Webster, and Butler, as their guest simply, and that she had not control of the management of the car she was riding in, and of its operation, and had no control over the party who was operating the said car that she was riding in, and no power to direct his operation of said car, the negligence of either the said Webster or Butler, or either one of them, if any, cannot be imputed to the said Flossie Mericle as negligence upon her part.

"The said Flossie Mericle was only required to use such care at the time for her safety in crossing defendant's track, on her part, as a person of ordinary care, prudence and caution would exercise under the then existing circumstances surrounding her; and if you find from all the evidence before you, when weighed in the light of these instructions, that the said Flossie Mericle did exercise such care on her part, she was not guilty of negligence contributing to her injury.

"If, however, the plaintiff has failed to establish such reasonable care on the part of the said Flossie Mericle, about the time the car she was riding in approached the crossing on defendant's road, by the preponderance of the evidence, when viewed and considered in the light of the law as given you in these instructions, the plaintiff cannot recover in this case."

The trial court was of the opinion that the first four of these instructions were erroneous, and that the errors were not cured by the last one, because of the last paragraph thereof; and we are disposed to agree with it in this conclusion. The

instructions given seem to have imposed upon plaintiff's intestate the same duty as if she were the driver and in charge of the machine; whereas she had the right to rely upon what the driver of the machine was doing, and upon his care for the safety of himself and others. The law on this subject was well stated by Mitchell, J., in *Howe v. R. R. Co.*, 62 Minn. 71 (64 N. W. 102, 30 L. R. A. 684), as follows:

"Defendant's contention is that the rule requiring a traveler on a highway, on approaching a railroad crossing, to 'look and listen,' so as to avoid danger from an approaching train, is, to its full extent, as applicable to one who is being carried in a vehicle owned and driven by another as it is to the driver, who has the control and management of the team, although the passenger has no control over the driver or the management of the team, and although no relation of principal or agent or master and servant exists between the two, so that the doctrine of *respondeat superior* would apply, or although they are not engaged in a joint enterprise, so as to create a mutual responsibility for the acts of each other. We do not think that this is, or, on principle, ought to be, the law. Negligence means merely the want of ordinary or reasonable care according to circumstances. This court, in common with most courts, has held, as a matter of law, that reasonable care requires a traveler driving along a highway, when approaching a railroad crossing, to use his senses by looking and listening to discover and avoid danger from approaching trains. Under exceptional circumstances, there may be exceptions even to this rule. But the degree of care which an ordinarily prudent and cautious man usually exercises will depend somewhat upon the responsibility which is cast upon him. And it does not seem to us that, because reasonable care makes it the absolute duty of the person who has the control of the team and vehicle to look and listen, it necessarily follows that reasonable care imposes the same absolute duty upon one riding in the vehicle, but who is not intrusted with the control and

management of the team, and has no control over the person who has. Of course, the fact that the passenger, who has no control over the team or driver, is not chargeable with the negligence of the driver, does not relieve him of the duty to exercise reasonable care to avoid danger. The fact that he is not responsible for the driver's negligence will not relieve him from responsibility for his own negligence. But the question is, what constitutes negligence, and what is the standard of reasonable care on the part of the one situated as was this plaintiff? If plaintiff had known that Pomeroy was an incompetent driver, or had known or had reason to believe that he was not performing his duty by looking for approaching trains, and had nevertheless neglected to look for himself, he would undoubtedly have been guilty of negligence. Or if he had in some way actively participated in Pomeroy's negligence, he would have been negligent. But that is not this case, or at least the evidence does not establish it. We think that it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, who he had no reason to suppose was neglecting his duty, that he was required, when approaching a railway crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team. And our conclusion is that a court cannot hold, as a matter of law, that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in 'looking and listening' on approaching a railroad crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that under ordinary circumstances passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting a hard and fast rule that they are guilty

of negligence in doing so. Every case must depend largely upon its own particular facts. . . .

“Some courts make a distinction between private conveyances and public conveyances operated by common carriers, but it seems to us that any distinction based on this ground alone is wholly indefensible on principle. Others seem to make the position of the passenger the test, holding, impliedly at least, that when he is seated away from the driver by being separated from him by an inclosure, or by being inclosed in the carriage, is without opportunity to discover danger, or to inform the driver of it, the rule of ‘looking and listening’ does not apply to the passenger, but that otherwise it does. The presence or absence of these circumstances may be, and usually would be, material evidence upon the question of the passenger’s negligence, but to hold as a matter of law, and as a rule of universal or even general application, that in their absence the passenger is guilty of contributory negligence if he does not ‘look and listen,’ is, in our opinion, not justifiable upon either principle or reason.”

This rule appears to us to be sound, and it does not relieve the occupant of a vehicle driven by another of all care on his part as appellant’s counsel suggest.

Part of these instructions were not submitted to counsel before they were read; and for reasons already stated, the complaint of and objection made to them in the motion for a new trial was timely.

We need not say more. The trial court did not abuse its discretion in granting the new trial, and its order must be and it is,—*Affirmed*.

LADD, EVANS and PRESTON, JJ., concur.

URBANA CONSTRUCTION COMPANY, Appellant, v. WEBSTER COUNTY-CALHOUN COUNTY JOINT DRAINAGE DISTRICT NO. 16-31 et al., Appellees.

CONTRACTS: Engineering Terms—Flexible Meaning—Oral Understanding—Practical Construction. When an engineering term capable of different meanings (for instance "rock work" in a contract for excavation) is used in a contract, evidence as to the oral understanding at the time the contract was under consideration as to the sense in which the term was used is quite persuasive, especially when a claim based on a counter construction was concealed until the work was done.

Appeal from Webster District Court.—HON. R. M. WRIGHT, Judge.

THURSDAY, MARCH 11, 1915.

ACTION to recover an alleged balance due under a contract for the construction of a tile drain in a joint drainage district comprising lands in Webster and Calhoun Counties. Trial was had on the equity side of the court. Relief was awarded by the trial court as to one small item but was denied as to the principal question in controversy. Plaintiff appeals. —*Affirmed.*

Price & Joyce, for appellant.

Mitchell & Fitzpatrick, F. A. Grosenbaugh and John W. Jacobs, for appellees.

EVANS, J.—The plaintiff was a partnership consisting of one Stewart and Van Wegen. It is represented herein by

Stewart alone, who acquired the interest of his co-partner.

1. CONTRACTS :
engineering
terms : flexible
meaning : oral
understand-
ing : practical
construction.

The defendants are the supervisors of the two counties comprising the joint drainage board which entered into the contract sued on. In May, 1909, the plaintiff entered into a written contract with the defendants for the construction of the main tile drain for the joint district. The contract was based upon a bid which the plaintiff had filed about a year prior. This bid and the contract in pursuance thereto provided for the payment to the plaintiff of a lump sum of \$32,200.00. Plaintiff's bid contained the following notation or qualification: "For what is considered rock work \$3.00 per cubic yard." The present action is based upon this proviso in the bid. The claim is that plaintiff did 1,121 cubic yards of rock work and that he is entitled to recover \$3,363.00 therefor. The defendants deny that any "rock work" was done within the contemplation of the contract as the same was understood and construed by both parties by mutual oral agreement and as the same was construed by the parties by their conduct throughout the entire period of performance.

By the testimony for the plaintiff, it is made to appear that in the course of the work he encountered many large rocks or boulders, the removal of which involved great labor and expense, and that the same was rock work within the meaning of the contract.

By the testimony for the defendants, it is made to appear that while the bid was under consideration by the drainage board, he was asked to state what he "considered rock work." Objection was also made by the board to having the term applied to boulders, which were conceded to be present upon and in the ground to a greater or less extent. That the plaintiff thereupon stated that he did not consider boulders as rock work and that the term as used in his bid was intended to apply only to solid or ledge rock. In engineering parlance, "rock work" is concededly a flexible term and may be applied

to loose rock or to solid rock. The cost of removing solid rock, however, is usually double that of removing loose rock. The term, however, is not usually applied to small stones of smaller dimensions than a cubic yard. The performance of the contract occupied a period of about two years, beginning in October, 1909. The alleged rock was encountered in the fall of 1910 and continued through the winter and until May or June. The engineer in charge furnished the plaintiff with the monthly estimates of the amount of work done, as provided by Sec. 1989-a9. These were filed by the plaintiff with the auditor and he drew thereon the "80% of the value of the work done according to the estimate," as provided in said section. These estimates never contained any reference to rock work and no member of the drainage board knew that the plaintiff was doing any rock work or claiming to do any at any time during the period of performance. Their first knowledge of such claim was in December, 1911, when the claim was presented. The claim then made, however, was so made upon the estimates and favorable recommendation of the engineer. Upon the trial the engineer was a witness for the plaintiff. The testimony of the plaintiff and the engineer is in harmony as to the fact that rock work was done and is in harmony also as to the reasons why it was never included in any of the current estimates. This reason was that the engineer believed and so informed the plaintiff that if a claim were made, the board would reject it. It was also said that the members of the board would probably want to examine such work for themselves and would not accept the report of the engineer thereon. It was, therefore, mutually agreed between the plaintiff and the engineer that it would be better for the plaintiff to defer making any claim until after the job was completed. This was the course pursued. The yardage which is now claimed for as rock work was included in the estimates as earth work and its value was estimated at the contract price of 36c per linear foot, which would amount to a little more than \$1.00 per yard. At the time that the

claim was first brought to the attention of the drainage board, the drain had been fully covered and most of it was plowed and cropped for the season of 1911. The testimony of the engineer Freimuth is important and we here set forth sufficient thereof to indicate its general character:

I think both Mr. Stewart and I were too easy, too slow. I made many reports during the construction of that improvement, concerning changes, and changes in the laterals, and things of that sort. I don't know how many, but there was a lot of them. When I said that we had been too easy, I meant to be understood that we had been too easy with ourselves, by us not giving any estimates on those rock while it was due. The Board were in the habit of holding up or rejecting my reports. I had never made an estimate on rock work before. I never had charge of rock work before that called for an estimate. I did not know that if I made a report or estimate on rock work that the Board would examine the work. I thought they would reject my statement, and that they would make an investigation, and my reason in not making that report was the belief that the joint Boards would reject it, but I expected and I had in mind that when the end came and I covered the whole matter in one estimate, that they would accept it. I expected they would accept an estimate covering the entire work, but would reject the monthly estimates. My final report was made after the work was finished, the ditch filled in, and part of the land broken up. I did not have in mind of destroying the evidence of the condition of the work. I thought it was as proper a time to make the final report then as at any other time before. I think so far as the district was concerned that the parties all knew it and examined it that were interested. I talked to them a good deal, yes. I talked to D. S. Coughlan, a member of the Board. I never met him on the work. I was before the joint meeting during the progress of the work probably a time or two. I talked over with the Board about the work not being pro-

gressing. That the work was not going very rapidly. I did not speak of rock work. The subject we talked of was the bulkhead. There was a washout at the upper end of the ditch. They made the ditch very wide, and we couldn't get started until we got a bigger bulkhead than was planned in the preliminaries. I was out on the work about twice a week during this progress from Knierim. I found that the tile was laid, and the ditch immediately filled in on top of the tile from about eighteen inches to four feet in. It varied. That was the condition of this ditch the various times I saw it, but it was not filled up to the rock line, not filled up as high as the rock came. I saw the rock and assumed that it extended to the bottom.

Q. And it is upon that basis that you have made your report for this thirty-three or thirty-four hundred dollars for work, on the fact that you could see a little of the rock, and assumed that it extended down to the bottom of the ditch?

A. Well, in inspecting the tile, I could hardly find places I could get through to the tile with my sounding rod, is how I know that the rock extended all the way down.

After the ditch was filled I had a rod that I stuffed down. I had some difficulty in getting it down, and I said that was rock. We used spades also in digging down through the rock to the tile. We would dig down through the filled ditch to the tile, and opened it up every three feet. In various places we did, and opened it up. We uncovered them for long stretches in places, after they had been filled once. My assistant helped me. His name was H. E. Stewart and some of Stewart's men.

Q. That is Stewart's men first filled in the ditch, and then, when you came along, they unfilled it, and looked at the tile, and then filled it in again?

A. Yes, sir.

That is the way I ordinarily do when I am inspecting it. I have ordered the contractors to leave it open until I

could see the tile, but I didn't in this case. It was a little too deep. I didn't hear any report of blasting out there, but I saw where they had been blasting. I was there on an average about twice a week. They were never blasting when I was there. I saw broken rock. I do not think putting heavy boulders back on the tile would do any hurt if there was sufficient dirt under them, six inches or a foot. In making these progress estimates, I measured the amount of the finished job. I gave estimates for the tile to be delivered on the ground, and then estimates for the excavation or the labor. I would measure how many yards or feet of tile had been laid, and give an estimate on that basis. My estimates that I gave covered the full depth and the full distance.

The plaintiff testified as follows:

"It was not my idea to conceal the fact of the rock work until the final estimate. I first asked for an estimate on this rock work when I got my monthly estimate. I don't know how far I had got in the rock work when the engineer told me that his report would probably be rejected. It was in the fall of 1910, I think it was. Somewhere about the latter part of October or the first of November. After that talk with the engineer he continued to give me monthly statements or progress estimates based on the figures that I set forth in exhibit No. 3, and I continued to accept eighty per cent. The only time I spoke to the board of supervisors about my claim for rock work was when I asked the board of supervisors to come out and look at it. I didn't tell them I was demanding anything. I told them I was in rock. I never did go to the board to make a claim outside of through Mr. Price. The first man I ever went to on my claim for rock work was to the attorney beside Mr. Freimuth, the engineer. Freimuth didn't say that he wouldn't give me estimates on the rock work. He said he thought it would be better to wait, and sent it in at once, so we would know how much there was of it. He said that the probability would be that the board would

reject his report, and by holding up my estimates, that I wouldn't be able to draw my eight per cent probably in time, which I was needing to make my payroll. I never thought anything about that as a reason."

It is needless to say that there was no legal warrant for the agreement and understanding between the plaintiff and the engineer. Under the statute it was the duty of the engineer to make monthly estimates of the "value of the work done." The plaintiff should not be prejudiced by any mere failure of duty on the part of the engineer but he is chargeable with his own part in it. The plaintiff knew that his claim for rock work was not disclosed to the drainage board at a time when the board was entitled to know it and at a time when an investigation of the facts would be convenient and certain. Not only so, but he actively withheld knowledge of such claim by his arrangement with the engineer and he must now bear the weight of this fact as a circumstance against him. Under the circumstances indicated, the recommendation and estimate of the engineer are subject to scrutiny. The plaintiff is entitled to the benefit of his testimony but such testimony must be weighed like that of any other witness. When the engineer made the final estimate and report, his employment with the county supervisors had virtually ceased. His testimony herein is friendly to the plaintiff. Its value is much weakened by the fact that he himself did not estimate the rock work at the time it was actually done but made it at a later time and after the work had been fully covered. At that time he depended upon his sounding rod for the dimensions of the ditch and the presence of stone. Needless to say that such a measurement could not be as accurate as one made in the appropriate time. So far, therefore, as his conduct is concerned it did not, prior to such attempted measurement, indicate any intention to estimate the rock work. It may be noted here that items for extras were included in the monthly estimates as to other matters to a total of about \$3,000.00 and

these were allowed in regular course by the board. The failure to include estimates for the rock work rests upon no pretense of reason except the belief that it would be rejected. It is not a question at this point as to whether such rejection would be right or wrong. The situation here presents either an active concealment by the plaintiff of his claim for rock work or else an acquiescence in the monthly estimates showing the value of the work done. This conduct assumes added importance by its relation to the oral construction put upon the term "rock work" at the time the plaintiff's bid was considered.

This suit was begun about one year after the filing of the claim. The defendants thereupon placed two engineers upon the course of the drain for the purpose of ascertaining as far as possible the character of the work. They caused holes to be dug to the full depth of the drain and immediately alongside thereof. These holes were 17 in number, 1,000 feet apart. They were all dug with spades. In some of these holes they found boulders. A few of these boulders were of such a size that they could be denominated in engineering parlance as rock work. The yardage thereof was estimated as 50% of 375. This was an uncertain method of measurement but none other was available to the defendants after they learned of plaintiff's claim. The plaintiff testified that he found his worst rock on the farms of Lynch and Mehring. On the other hand it appeared for the defendants that the owners of these lands were on the ground while the work was going on and discovered no rock work but occasional boulders only. Branch drains were laid by these owners on these farms and no rock work was encountered. Previous tile work had also been laid in this ground with like experience. This is not saying that the plaintiff did not have a difficult contract. A part of his trouble arose from sand and gravel and water and a part of it arose from boulders. Needless to say that any boulder of any size is a troublesome obstacle in the way of the digger of the ditch. The plaintiff used seventy

or eighty dollars worth of dynamite in breaking them up. However, the fact that there were more or less boulders upon the ground was known to all parties when the contract was made and this was the reason for the oral agreement as to what was "considered rock work." If there were boulders upon the surface of the ground, no further proof is needed that some boulders would be found in the ground. Taking the case in all its circumstances, we think it must be found that the parties agreed upon a construction that rock work should not be considered as including boulders but solid or ledge rock only. This conclusion gives consistency to the actual conduct of the plaintiff and the engineer in omitting the claims from the monthly estimates and gives consistency also to the mutual conduct of both parties throughout the period of performance.

The order entered below is therefore—*Affirmed*.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

C. J. FREED, Appellant, v. D. H. COLLINS, Appellee.

ASSAULT AND BATTERY: Aggressor—What Constitutes. The act of the defendant at the outbreak of the war in hurling even one-half of an egg, either in primitive or scrambled condition, at the plaintiff, even under provocation of an epithet to which no gentleman of self-respect is supposed to meekly submit, brands defendant as the aggressor and vindicates plaintiff's claim to damages (in this case \$5,000, reduced by the jury to \$7.50), especially when defendant lost all possible chance of forgiveness, in law, by immediately advancing with a long-handled shovel which, with the vigor becoming his three score and ten, he planted, at least twice, on that portion of plaintiff's anatomy "which has always been deemed surgically safe."

Appeal from Webster District Court.—HON. C. G. LEE, Judge.

MONDAY, MARCH 15, 1915.

ACTION for damages for assault and battery. There was a counterclaim for rent due. There was verdict for the de-

fendant for an amount less than his claim for rent. The plaintiff appeals.—*Affirmed.*

Healy, Burnquist & Thomas, for appellee.

Kenyon, Kelleher, O'Connor & Price, for appellant.

EVANS, J.—The alleged assault and battery occurred on June 20, 1913. The parties hereto were neighbors and friends. They were both old men, the defendant being in his seventieth year and the plaintiff a few years younger. The defendant was a laboring man and a bachelor. The plaintiff was a retired farmer. The defendant owned two small residences in Fort Dodge side by side. He occupied the basement of one of them as his own home. He rented the other to the plaintiff. The plaintiff caused the replacement of a broken window pane at a cost of \$1.20. He deducted the amount from his check in payment of the next installment of rent. But Collins refused to accept the check on the ground that the repair bill was twice as large as it ought to be. So Freed paid the full amount of rent due. At a later time he again deducted the repair bill from his check and again Collins refused to accept the check. Such was the first curling smoke of the final conflagration. On June 20th, the parties met and visited. They separated in the manner hereinafter indicated. The following from the testimony of Collins indicates his point of view:

“Freed came over about seven o'clock. I offered him a chair and told him to sit down. He said he had come to see about the screen windows. I said I was working hard this week, and Sunday I will put up the screen windows. He didn't find any fault. He got up then and we had a little sociable talk. When he got up I said: 'Mr. Freed, I wish you would settle with me.' He said: 'You son-of-a-bitch, you can sue me and get it if you can.' I had an egg in my left

paw and I was eating the egg and I let it fly at him. He started to come in again, and I had an old shovel setting there that I used to clean up the yard, and he started to come in and I hit him a couple of licks in the butt with the shovel. He was outside when the egg hit him. Then he started over to his house as if he was going to get another drink of whiskey—he was drinking some—and I said: 'Mr. Freed, I don't want to fight anybody, I am too tired.' After he was struck with the egg he started to his house. Then he came right back and told me to come out and fight him, and I told him: 'No, I wasn't able to fight anybody.' I didn't let him come in a second time. When he went to come in I struck him with the shovel. After he called me a son-of-a-bitch, he went out into the other room, and said: 'I have a notion to break your neck.' "

CROSS-EXAMINATION.

"After I hit him with the egg, he went outdoors, and just as he was going outdoors he said he had a notion to break my neck, and then he turned around and it seems he was going to come in again, and then I got the shovel and gave him a couple of taps on the butt with it. He was just outside of the door when I hit him with the shovel, at the west end of the house. When I hit him with the shovel I was standing at the door inside. The door was open. Whether it was a screen door I couldn't say. I am sure the door stayed open that night. He was two or three feet from me. I was standing right inside the door. He was standing facing me, and he started to go and I reached and hit him two raps on the butt with it. It was a long handled shovel. I hit Mr. Freed with the shovel just as he was starting to go away from me. I waited until he started to go away from me before I hit him. I think I hit him twice. According to his say so I tried to hit him hard. I don't know whether I did or not. It wasn't my purpose to hit him hard. The reason I hit him when he turned away from me was because I didn't want to

hit him any place only on the butt. I didn't want to hurt him nor I wouldn't hurt Charlie Freed again."

The following from the testimony of Freed will be sufficient to indicate his version of the affair:

"He had no table or chair on that side of the house. At first all he said was he asked me how long I was going to live in the house without paying rent. He said that in a good natured way. I told him I would pay it now. Then I took the check out of my pocketbook; the same check I had showed him two weeks before. Then he threw an egg at me and got mad. I don't know where he got that egg. I think he had it in his pocket. He said he wasn't going to pay that \$1.20 for the window light, it was too much. I didn't know whether he was angry at that time. I was not. Before he threw the egg, I couldn't say that he looked like a man that was going to fight. When he wouldn't pay the \$1.20 without another word he threw the egg at me. I took out the check and showed it to him and said 'this is the check,' but he wanted the \$1.20 and he didn't take the check. Then he threw the egg at me. What struck me was not half of a soft boiled egg, it was a raw egg. . . . Then he took hold of his spade shortly after he threw the egg. I thought he was angry then, and I stayed right there. After he hit me with the egg, I told him if I owed you anything I am willing to pay it, and now you are taking your own law to me when you are getting after me like that, that is throwing the egg at me. I don't know what Collins said when I said that. I thought he was angry and was taking the law into his own hands. I did not start to go to my own house before he struck me. I stayed right there. It was after he struck me that I said 'if you want to fight we will go out in the street.' I didn't want to fight him on his own place there. That is all I can remember that I said in that conversation. I don't recollect what Collins did when I spoke about going out into the street. . . . When I first stepped out of the house and Collins spoke to

me, I couldn't tell whether he was angry or not. There was no sign of his being angry."

The case has some cartoon features. Each of these parties appears to have had his own eccentricities. There is a note of complaint in the testimony of Freed because Collins made the assault without giving any sign of anger. And Collins testified: "I was not angry with Mr. Freed when I hit him. When he called me a son-of-a-bitch I got angry, I couldn't strike him very hard with half an egg." At one point the issues of their controversy were interrupted by another; and that was the question of where the war zone should be. Collins wanted the fight to be held in the backyard. Freed wanted it in the street in front of the house, because he did not want to fight Collins upon his own premises. This question was never settled. The evidence was sufficient to sustain a finding that Collins was the aggressor and was guilty of assault and battery. Whether it was sufficient to sustain a contrary finding and whether the circumstances indicated should be deemed aggravating or mitigating would be more difficult questions. We need not pass upon these. The jury was evidently inclined to be charitable in judgment to both parties. As hereinafter shown, a small amount was allowed Freed as damages for the assault. As compared with the five thousand dollars claimed in the petition, the amount thus allowed by the verdict was very small. But the amount had support in the evidence. This evidence was direct that Collins was "too tired" to fight and that Freed "didn't want to fight him on his own place there;" and that Collins did not "hit him any place only on the butt."

Collins was the older man. But he was also the smaller and thereby had the advantage of the smaller girth. It is one of the mercies of the Almighty toward old age that He will not furnish it with heart-action and respiration sufficient to finish a fight. If these men had been fifty years younger, we might have had to deal with fatalities. As it is, they have

escaped with a property loss to Collins of "half an egg"; and some consequential damage to Freed from the egg-stain and from a few "black and blue" spots on an area of the body which has always been deemed surgically safe, and which has always borne harmlessly the corporal discipline of all the generations.

It was a circumstance against Collins that his attack was below the generally accepted level. Our best information, *aliunde*, is that the "belt" is the water-line of pugilistic standards. Hostilities delivered below such line are deemed submarine, and are not honored on the field of honor. Whether they are justified under the rules of warfare obtaining between neighbor and neighbor, or between landlord and tenant, we are not at present advised. Collins, being the shorter combatant, may have delivered the assault as high as his stature would permit.

We may safely assume that these circumstances were not overlooked by the jury. The net effect of the verdict would seem to indicate the jury view that though the assaulting maneuvers were not murderous, they ought to have been pitched at a higher plane.

II. The errors of law assigned are all predicated upon instructions given by the court and upon requested instructions refused. These all bear upon the question of liability of the defendant to the plaintiff for the assault and are predicated upon the assumption that no recovery was allowed therefor. Before passing to the consideration of such errors, we must first ascertain from the record whether an allowance of some amount was made by the jury on the plaintiff's cause of action. If yea, then none of the errors complained of could have been prejudicial.

The counterclaim was for two months' rent at \$15 per month and for potatoes to the value of \$5. The verdict was for the defendant for \$21.30. It is undisputed that the defendant was entitled to a rental of \$15 per month payable in advance on the 7th day of each month. It is also undisputed

that the monthly rental falling due on June 7th and July 7th was unpaid except to the extent of \$1.20 for the repair of the window. This situation is met in argument by the suggestion that Freed moved out of the premises before the expiration of thirty days after July 7th. But this fact would not reduce the amount of rent due on July 7th which was then \$30, less \$1.20. Freed was a tenant at will. In order to render him liable for the rent due on July 7th, it was not necessary that he should continue in possession for thirty days thereafter. It was a sufficient consideration that he had a right to do so. Neither party could legally terminate the tenancy without thirty days notice to the other. If Freed owed Collins \$30 rent on July 7th, he likewise owed it to him on the subsequent dates. Freed testified that he left the premises about July 25th. If it were held that his rent could be apportioned because of his termination of the occupancy before the expiration of his time, even then he was owing for 18 or 19 days in July, which would put him in arrears not less than \$24. From any point of view, therefore, it is evident that the jury did allow a recovery to the plaintiff in a small amount. Under the undisputed evidence, something was due the defendant for potatoes. Under his evidence, the amount would be \$5. Under Freed's evidence, it would be little more than \$1. It is manifest, therefore, that the jury allowed upon plaintiff's cause of action not less than \$7.50 and not more than \$12.50. Inasmuch as there was a finding of liability against the defendant for the assault, the alleged errors in the instructions presented for our consideration were necessarily nonprejudicial. This brings the parties to the end of the lane. They have demanded all their rights and have received them. They have had their full "day in court." Each has had the best there was to be had in the way of counsel and other aid. It is not for us to speculate, though we may involuntarily hope that the final account of expense of these luxuries may be as moderate as the verdict and as diminutive as the *casus belli*. We think it providential for both parties

that the litigation must now end. Otherwise, history might repeat itself in another "calf case." In the parlance of diplomacy, the incident will now be deemed closed. The judgment entered below will be—*Affirmed*.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

SARAH L. HUGHES, Appellant, v. MARION E. SILVERS et al.,
Appellees.

DEEDS: Fraud—Who Must Establish or Negative—Parent and Child

- 1 **—Confidential Relation.** Ordinarily he who alleges must prove. An exception arises (a) where a parent deals to his advantage with a dependent child, and (b) where the child deals to his advantage with a dependent parent. Dependence marks the exception. In the first case the parent and in the latter the child must establish a negative—that he was guilty of no fraud, duress or like poison in taking the conveyance in question. In the zone of non-dependence, the ordinary presumption of good faith prevails.

PRINCIPLE APPLIED: In instant case the mother, 70 years of age, who conveyed to certain of her children, had not for years resided with them. On a few occasions she did ask their advice but did not habitually rely on them, nor did they manage her affairs. *Held*, no such confidential relation existed as to cast on the child the burden of proof.

DEEDS: Evidence—Undue Influence—Declarations of Grantor Im-

- 2 **peaching Deed—When Admissible.** Subsequent declarations, alone, of a grantor, howsoever strong, impeaching the validity of his deed, will not authorize the setting aside of the deed. Such declarations should not be permitted to enter the record *unless* substantive evidence of undue influence or the like is *first* produced. When such evidence is produced such declarations are admissible (a) to show the effect of such undue influence on the grantor's mind and (b) as indicating grantor's mental condition.

DEEDS: Undue Influence—Mental Incapacity—Inference from Un-

- 3 **just Disposition.** It cannot be inferred that the grantor in a deed was of deficient mental capacity or was the victim of undue influence simply because the deed deprived some of the children of the interest they otherwise would have taken, the execution

of the deed being logical and rational in view of the circumstances.

PRINCIPLE APPLIED: The property in question was distributed after the father's death among all his children, a small portion being sold to pay debts. Later the mother purchased the share of each child and also that which had been sold under administration and still later redistributed the property among all her children. Later, again, the property was all conveyed to one of the children (presumably for value) and said latter child dying, the property passed to the mother again as his sole heir. Later, the mother conveyed to two of her sons, this latter conveyance being the one attacked.

WITNESSES: Competency—Transaction with Deceased. A witness, 4 though interested, is competent to testify to a transaction with a deceased person in which the witness took no part.

DEEDS: Undue Influence—Dying Request—Effect. A deed made by 5 a mother in compliance with the dying request of a son furnishes persuasive reason, in the instant case, for sustaining the deed.

Appeal from Wapello District Court.—HON. F. M. HUNTER,
Judge.

MONDAY, MARCH 15, 1915.

ACTION in equity to set aside a deed of real estate and for other relief. The material facts are stated in the opinion. The trial court dismissed the bill and plaintiff appeals.—*Affirmed.*

Earl Ferguson, C. R. Barnes and Roberts & Webber, for appellant.

A. C. Steck and E. K. Dougherty, for appellee.

WEAVER, J.—The following general statement sufficiently explains the development of the controversy which this appeal brings to our attention. John J. Silvers died intestate in the year 1871, leaving a widow, Nancy A. Silvers, afterwards Nancy A. Sutton, and several children. He left a farm of

140 acres, of which 15 acres were sold in the course of administration for the payment of debts, but this tract was thereafter purchased by the widow in her own right. Of the remainder of the land, 40 acres were set apart to the widow and 85 acres passed in six equal shares to their surviving heirs or their representatives. The three older children married within a comparatively short time after their father's death and established homes. The plaintiff herein, Sarah L. Hughes, who was the third child, married at eighteen years of age. The three younger sons, known in the record as Marion (or Dick), Austin and Festus, who were still of tender years at the time of their father's death, remained longer at home and it may be assumed that the mother came to regard them as the objects of her especial care and affection. In the course of time, through a somewhat confusing series of deeds, the interests of the widow and the three older children became vested in Austin, subject to a life estate in the mother. Certain other conveyances will be noticed later. Austin died intestate, leaving his mother his only heir. After Austin's death, acting in pursuance, as is alleged by defendants, of a promise made by her to Austin when on his death bed, the mother made to the defendants herein, Marion and Festus, a deed under date of April 17, 1901, conveying to them what is described as, "all my undivided interest as heir at law of Austin Silvers deceased, or any other interest I may have in and to the following real estate," describing the entire farm of 140 acres and reserving therein a life estate for herself. This deed was duly recorded on April 23, 1901. In the year 1909, the mother died intestate, leaving as her only heirs her children, Frank, Sarah L. (plaintiff herein), Marion and Festus and a grandson who represents her deceased daughter, Phoebe. This action is brought by the daughter, Sarah L., to set aside the deed made by the mother as above shown. The original petition alleged in general terms that the deed "was procured in a wicked and designful manner by misrepresentation, fraud

and deceit at a time when the grantor was incompetent and incapable mentally and physically" for the transaction of such business and by the exercise of fraud and undue influence. By a subsequent amendment, it was charged that the deed was obtained by duress and undue influence, which continued from the date of the deed until the grantor's death, eight years later. They also allege that the grantor was deceived by defendants into the belief that the paper she executed was a lease, instead of a deed, and that she lived and died believing that defendants were her tenants of the property instead of her grantees of the title. In a third amendment, the deed sought to be cancelled was for the first time set out. A fourth amendment was filed after the evidence was introduced, repeating the allegations of fraud, duress and undue influence and averring that the same began from a date prior to the making of the deed and continued during the remainder of the grantor's life. The defendants answered admitting that their mother died intestate and that plaintiff is one of her heirs at law. They also admit the conveyance to them by their mother and the record of the deed but deny all allegations of fraud, duress, and undue influence. They also plead the statute of limitations.

Upon hearing the evidence, the trial court found that the allegations attacking the validity of the deed had not been sustained by the evidence and that even if the defendants be held to have the burden of showing the good faith of the transaction, such fact had been affirmatively established.

Counsel for appellant have favored the court with a very elaborate and carefully prepared argument devoted principally to a discussion of the facts. Their analysis of the record is ingenious and the evident earnestness with which it is presented commands our respect, but we are unable to follow them to their conclusion.

I. It is alleged and counsel assume it to have been established that the defendants stood in such confidential rela-

tion to their mother that the burden is upon them to show the absence of undue influence on their part. In our judgment, however, the record does not justify the assumption. She was not and for years before her death she had not been a member of the same household with her sons.

1. DEEDS: fraud: who must establish or negative: parent and child: confidential relation.

While it is shown that in a few transactions she had asked the advice of one or both of them, there is no evidence that she habitually relied and depended upon them or that they assumed or had charge and management of her business. She was at that time, according to appellant's estimate, about 70 years old, by no means such an advanced old age that we may presume extreme senile decay. She probably had no very extensive business transactions or interests and so far as appears she was not dependent upon anyone for the management or conduct of her affairs. There is a presumption of confidential relation where a parent deals to his or her advantage with a child immediately after the latter arrives at majority, also where the child deals to his advantage with a parent when by reason of old age or weakness the condition of dependence is reversed, and when such conditions are shown, the burden is upon the dominant party to negative undue influence; but between these extremes, while neither parent or child is in a position of dominating influence over the other, the ordinary presumption of good faith obtains and he or she who alleges fraud or duress or undue persuasion is charged with the burden of proving it. That a parent should consult with a child or that a child should consult with a parent concerning matters of business interest is natural and proof of that fact alone has no tendency to prove undue influence. For a general discussion of this subject see *Curtis v. Armagast*, 158 Iowa 507.

We there said, "The unfavorable presumption arises only where the child by reason of youth and inexperience or other special circumstances is to some extent under the dominion, control or paramount influence of the parent, or where

the child is the dominant personage in the relationship and the parent has become the dependent intrusting herself and her interests to his advice and guidance."

Applying that rule to the evidence in this case, we hold there is here no showing of such confidential relation as will cast the burden of proof on the defendants.

II. Nor do we find in the record any substantial evidences of undue influence over the mother in making the deed in question. If we lay aside the testimony as to alleged

2. DEEDS: evidence: undue influence: declarations of grantor impeaching deed: when admissible.

statements or complaints made by her after the deed was given, to the effect that the sons or one of them had made her do it and that she did not know what she was doing, the record is quite barren of anything like a showing of duress or undue pressure upon the grantor to induce her to make this conveyance. That such subsequent declarations by a grantor are not of themselves evidence on which to impeach the validity of a conveyance has often been held by this and other courts. *Johnson v. Johnson*, 134 Iowa 33; *Kah's Case [In Re Estate of Kah]*, 136 Iowa 116; *Ellis v. Newell*, 120 Iowa 71, 74.

It is, of course, true, as appellant argues, that such testimony may be admitted, not as showing undue influence, but as showing the effect on the parent's mind of whatever undue influence, if any, was exercised upon her to procure her to make the deed, and as indicating her mental condition. *Bates v. Bates*, 27 Iowa 110; *Stephenson v. Stephenson*, 62 Iowa 163; *Johnson v. Johnson*, 134 Iowa 33.

But this rule presupposes the existence of other substantive evidence of the alleged undue influence, and where none appears, the showing of subsequent statements, no matter how strong, will not sustain a decree setting aside the conveyance. In such case, the "evidence is no more than hearsay and ought not to be received to establish the facts related." *Johnson v. Johnson*, *supra*.

And such, as we read it, is the case before us. It is only

by a forced materialization of bare suspicion into substantial fraud, by putting the worst construction upon acts and words equally consistent with good faith and integrity of purpose, and by finding indirection and perjury in the testimony of witnesses whose general reputation for truth and veracity are not otherwise unimpeached, that one can discover any ground upon which to negative the integrity and validity of the deed in controversy. Of some of the principal allegations of the petition,—for example, that the mother was deceived into the belief that the instrument executed by her was a simple lease instead of a conveyance of title,—there is not a word of testimony tending in the remotest degree to establish the truth. On the contrary, it is shown by plaintiff's own witnesses that her mother knew the true character of the paper and long before her death informed plaintiff she had made it. Indeed, if one of these witnesses is to be believed, she returned alone to the notary after the paper had been executed and re-examined it and appeared to be satisfied with it.

Much is said in argument of the unnatural and unjust disposition made of the property by this mother and it seems to be thought that plaintiff, because of faithful service in the family, while still a minor legally and morally owing such service, had acquired at least a moral right to share in property acquired by the mother many years after

8. DEEDS: undue influence: mental incapacity: inference from unjust disposition.

plaintiff had left the home and ceased in any manner to contribute to the mother's maintenance or to assist her in the accumulation of an estate. This claim is without justification in fact. Plaintiff's right to share in the estate left by her father had been fully recognized and she had sold and conveyed her portion to her mother, receiving presumably its full value. Still more, the mother, having had her widow's share set apart to her, having also re-purchased in her own right that part of the land sold for the payment of the debts of the estate and having bought out the inter-

ests or shares of her children, thus perfecting the distribution of the father's estate and concentrating the title in herself, proceeded by a deed of conveyance to re-distribute the same property among all her children, including plaintiff, who thereafter sold and conveyed to Austin the share and interest thus derived. In other words, this land had twice been distributed among these children, once as the property of the estate of the father, and again by the voluntary act of the mother, who had become its owner, and on each occasion, plaintiff had received and accepted the share given her and by sale and conveyance thereof had realized upon it. The title which thereafter came to the mother by inheritance from Austin was not burdened with any equity, natural or otherwise, in favor of plaintiff, who contributed nothing to its acquisition, and it was neither strange nor unnatural if she felt that her duty as a parent to devote her estate to her children generally had been fully discharged and that she was at liberty to dispose of this property received from her son in accordance with her personal inclination and to prefer those who she believed (whether correctly or incorrectly is immaterial) had the greater claim on her bounty. The argument that the court should infer either lack of mental capacity on her part or the exercise of undue influence on the part of the grantees, because the deed operated to give to the latter an unnatural or unjust preference in their mother's estate, is not justified by the record.

III. There is evidence that Austin, when about to die, requested his mother to convey to his brothers, Marion and Festus, subject to her own life estate, the property which she would by law inherit from him and that she promised so to do.

4. WITNESSES :
competency :
transaction
with deceased.

This testimony, appellant insists, should not be considered because the witnesses were incompetent under the statute, Code Sec. 4604. Without pausing to review the authorities, it is sufficient to say that under the construction put upon the statute by this court—a construction which is much less strict

than is adhered to by the courts of some jurisdictions—we think the witnesses qualified themselves to testify by showing that they took no part in the conversation or transaction of which they undertake to speak. While we think proof of the dying request of Austin and his mother's promise to convey the property to the appellee is not necessary to the affirmance of the decree rendered below, it is nevertheless an important circumstance and affords very substantial support for the finding sustaining the deed. Indeed we have held that under some circumstances a promise of that nature will be specifically enforced. *McDowell v. McDowell*, 141 Iowa 286.

But even if such a case is not here made, a request and promise of that nature is one which the average mother would regard as peculiarly sacred and in performing it no wrong,

5. Duress: undue influence: dying request: effect. legal, equitable or moral, would be done to her surviving children. Had Austin lived to enjoy the property or to spend it in pursuit of

his own pleasure, plaintiff would have had no cause of complaint. Had he made a will devising it to charity or to a friend outside of the family or to his brothers, Marion and Festus, plaintiff could not rightfully have objected thereto. Why then should it be said that she has been wronged because her mother, receiving the legal title by operation of law, sees fit to treat her promise as binding upon her conscience and carries it into effect?

It appears in the record that the mother contracted a second marriage which did not prove a happy one and a divorce was procured by her some time after the death of her son Austin. The relations between herself and husband and his refusal to unite with her in making the conveyance caused delay in the matter and it appears that the deed was not executed and delivered until the day after the decree of divorce was entered, when the husband was no longer a necessary party to the conveyance. We are asked by counsel to note this fact as constituting a very suspicious circumstance pointing to the conclusion of bad faith, but we confess our

inability to discover in it the slightest evidence tending to support any allegation of the petition. It is gravely hinted that in some way an advantage was taken of the divorced husband, but as he is not in this case and so far as we know is satisfied with his emancipation from the bonds of matrimony, the suggestion of a possible wrong to him is superfluous.

Counsel also allow their zeal to lead them beyond the limits of fair argument when they describe the request of Austin to his mother and her promise to him to convey the land to Marion and Festus as a "cold blooded conspiracy" against the alleged rights of the plaintiff, a conspiracy having its origin in the mind of the dying man, whose conduct therein, if truly stated, is said by counsel to explain how it happened "that he had got so much of the property into his own name." Conspiracy against whom, and to what end? Plaintiff had no interest of any kind in the property. She could derive none by Austin's death, for she was not his heir. He had the absolute right to dispose of it by deed, by will, by gift, to whomsoever he pleased. If he died without making such disposition, the mother would inherit it and with it the same unlimited power to devise, convey or give it away. What occasion then for a secret, wicked combination to accomplish a thing which both or either had a perfect and indisputable right to do?

Again, we may ask why the insinuation, which is more than once repeated, that Austin had acquired his title to the land by some fraud or undue advantage at the expense of the other children of the family? Such fact, if it existed, would be without bearing in this case, but there is an utter and complete absence of any fact or circumstance in the record affording any ground for the imputation. So far as shown, he had acquired the interests of the other children by ordinary deeds of conveyance for a valuable consideration duly paid and his good faith may not be impeached by substituting sweeping denunciation for evidence.

The mother is shown to have given personal direction to the attorney who drew the deed. When prepared, she took it personally to the notary for its acknowledgment. It was recorded at her direction or with her knowledge. It had been thus on record for eight years before she died. She had never taken any steps to repudiate it or set it aside. It would be a palpable perversion of the evidence to hold that she was so imbecile as not to understand the meaning and effect of what she had done or was under such duress during all that period that had she desired to rescind the transaction she could not have done it. It may be true, as appellant argues from the record, that the grantees manifested an interest in having their mother make this conveyance, that they asked her to make it, or that they or one of them accompanied her when she acknowledged it. Such interest and such conduct are not inconsistent with perfect good faith and in the absence of other inculpatory evidence are wholly insufficient to show undue influence or duress. The trial court was, therefore, right in holding that plaintiff had failed in establishing her alleged cause of action.

IV. Concerning the effect of the statute of limitations, the position of the appellant, that in case undue influence is shown in the execution of the deed the statute does not begin to run until such influence has been removed and the grantor is in position to assert her rights, may be conceded to be correct. In this case, finding as we do that the allegations of confidential relation between grantor and grantees, and of undue influence and duress exercised by the latter have not been sustained, we see no reason why the action should not be held to have been barred. The deed was made and recorded in April, 1901, and this action was not begun until October, 1911, an interval of more than ten years and confessedly more than the period of limitation.

For the reasons stated we find the decree appealed from to be correct and it is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

THE MARCUS SHIPPING ASSOCIATION, Appellant, v. F. S.
BARNES et al., Appellee.

CORPORATIONS: Bankruptcy of Stockholder—Assignee's Right to

- 1 **Assets—Offsetting Indebtedness.** A trustee in bankruptcy acquires no higher or better title to the assets of the bankrupt than the bankrupt had at the time of the adjudication of bankruptcy unless the Bankruptcy Act so provides.

PRINCIPLE APPLIED: The statutory life of a corporation expired Dec. 12, 1907. It at once commenced to close up its affairs, sold its property, paid its debts and had a fund for distribution among its stockholders equal to \$40 per share. One Barnes had for years been the treasurer of the corporation and was \$2,000 short in his accounts with the corporation on and for more than four months prior to Oct. 25, 1911, on which latter date he was adjudged an involuntary bankrupt. Barnes owned $13\frac{1}{2}$ shares in the said corporation. Each share provided that it was not transferable by the stockholder without the consent of the directors if the stockholder was liable to the corporation. *Held*, whether the corporation had under the provisions of the certificate alone a lien on the fund in its possession to which the holder of the Barnes' shares were entitled, *quaere*. *Held*, the corporation did have the right against the trustee to deduct from that part of the assets due on the Barnes shares the amount of the shortage.

BANKRUPTCY: Trustee's Title—Right of Set-Off Against Trustee.

- 2 A corporation, passing through liquidation, has the right, against the trustee in bankruptcy of a bankrupt stockholder of the corporation, to deduct from that part of the assets of the corporation due on the stockholder's shares, the amount due the corporation from the bankrupt on a defalcation antedating the adjudication of bankruptcy by more than four months, the stock certificates so providing, and this right is not defeated by the terms of the Bankruptcy Act providing that the trustee "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and power of a creditor holding a lien by legal or equitable proceedings thereon." Act July 1, 1898, Sec. 47a (30 Stat. 557, c. 541) as amended by Act June 25, 1910 (36 Stat. 840, c. 412, Sec. 8 [U. S. Comp. St. 1913, Sec. 9631]).

BANKRUPTCY: Trustee's Title to Stock Holdings—Stock Subject to Equities. A trustee in bankruptcy of a bankrupt stockholder of a corporation takes the stock holdings of the bankrupt in the corporation subject to the equities existing between the corporation and its bankrupt stockholder, even though it be conceded that mutual indebtedness did not *technically* exist between the corporation and the stockholder at the time of the adjudication in bankruptcy.

PRINCIPLE APPLIED: (See preceding application.)

Appeal from Cherokee District Court.—HON. W. D. BOIES,
Judge.

MONDAY, MARCH 15, 1915.

THE opinion states the case.—*Reversed and Remanded.*

B. Radcliffe, for appellant.

J. F. Kass, for appellee.

WEAVER, J.—F. S. Barnes was the holder of thirteen and one-half shares, of the par value of \$20 per share, in the capital stock of a corporation known as the Marcus Shipping Association. The statutory period for which such corporation was organized and authorized to do business expired December 12, 1907, whereupon it went into voluntary liquidation, retaining its corporate form and organization for the necessary purposes of closing its business and distributing its assets. To that end it sold its property and after satisfying the claims of the corporate creditors, there was left a fund for distribution among the stockholders equal to the sum of forty dollars per share. For several years prior to the retirement of the corporation from business, Barnes had served as its treasurer and was still holding that position when he was adjudged an involuntary bankrupt upon a petition filed October 25, 1911, on which date and for more than four months prior thereto he had in his possession as such treasurer of the moneys received by him in that capacity the amount of

\$2,000, which he had not paid over or accounted for. To make entirely clear the question of law hereinafter stated, it should further be said that the certificates of stock issued by the corporation and held by Barnes each contained a provision or stipulation in the following words: "Transferable only on the books of the Association, in person or by attorney, on the surrender of this certificate. Not transferable by any stockholder liable to this association as principal debtor or otherwise without the consent of the Board of Directors."

The bankruptcy proceedings against him being still pending, plaintiff brought this action in equity against the bankrupt and the trustee of the bankrupt estate. The petition states the plaintiff's case in two counts. In the first count, the foregoing facts are recited and based thereon, plaintiff asserts a lien on the fund in its possession to which the holders of the Barnes shares of stock are entitled in the distribution of the corporate assets, and asks a decree establishing said lien and for the enforcement of the same for the payment of Barnes' debt to the corporation.

In the second count of the petition, the same facts are recited and plaintiff prays that in case the lien asserted by it in the first count of the petition is denied by the court, then in such event it may be decreed and held to have an equitable right to set off the indebtedness of Barnes to the corporation against the demands of the trustee upon the certificates of stock.

To this petition the general demurrer of the defendants was sustained by the trial court. In an opinion accompanying the ruling, the court speaks only of the plaintiff's claim for a lien and reaches the conclusion that while it is competent for a corporation to retain a lien on the shares of a stockholder to secure the payment of his indebtedness to it, yet such authority must be found in some appropriate provision of the corporate articles or by-laws and that in the absence of such provision the reservation of a lien in the certificates of stock is ineffectual.

Under the opinion we are about to express upon that phase of the case presented by the second count of the petition and the demurrer thereto, it is unnecessary for us to pass upon the correctness of the position thus

1. CORPORATIONS: bankruptcy of stockholder: assignee's right to assets: offsetting indebtedness. stated by the court below. Leaving that question undecided, we hold to the view that under the admitted circumstances the corporation is equitably if not legally entitled to the set-off

which it asks. If Barnes himself were suing for an accounting to determine and recover his share of the corporate assets, no one would think of questioning the right of the corporation to set off its claim against him for whatever balance there might be due from him as its treasurer. It is a well settled proposition that an assignee in insolvency or trustee in bankruptcy acquires no better title to the estate or property or assets of the debtor than the debtor himself had at the time of the assignment or the adjudication of bankruptcy (*Warner v. Jameson*, 52 Iowa 70; *Wasey v. Whitcomb*, 132 N. W. (Mich.) 572; *Zartman v. Bank*, 216 U. S. 134; *In re Scruggs*, 205 Fed. 675); and unless there be something found in the terms of the bankruptcy statutes inaugurating a change of the rule, we see no reason for denying its application to this case. The only provision of the federal statute to which we are cited is that part of the Act of June 25, 1910, amending Sec. 47a of the Act of 1899, 36 Statutes at Large, 840, which

2. BANKRUPTCY: trustee's title: right of set-off against trustee. provides that the trustee in bankruptcy "as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." If in applying this statute we are to say the trustee acquired a lien equivalent to that of an attaching creditor, it is necessarily a lien which came into existence only with the adjudication of bankruptcy, and we think such lien is clearly subject to the right already existing in the corporation, in liquidating its assets for the purpose of distribution

preparatory to a dissolution of its corporate existence, to deduct from that part applicable to shares held by Barnes the amount of his indebtedness to the corporation. Bearing upon this position see *In re Anson Mercantile Co.*, 203 Fed. 871; *Big Four Implement Co. v. Wright*, 207 Fed. 535; *Wasey v. Whitcomb*, 132 N. W. (Mich.) 572; *Remington on Bankruptcy*, Sec. 1170.

What the trustee obtained title to, if anything, was the certificates held by Barnes. These certificates were the paper evidence of Barnes' right to the number of shares named therein, and in acquiring such title the trustee acquired standing to assert and enforce all the rights which, but for the bankruptcy proceedings, Barnes could have asserted and enforced, and no more. Appellees in argument, while apparently conceding this rule in its general statement, deny its application to the facts in this case because, they say, while it does appear that at the date of the adjudication of bankruptcy Barnes was and for more than four months had been indebted to the corporation, it does not appear that the corporation was then indebted to Barnes in any sum, and did not in fact become indebted to anyone upon these shares of stock until the process of liquidation was complete and the corporate assets ready for distribution, at which time the trustee had acquired title to the stock and the set-off which might have been made against Barnes is not available against the trustee. But we can admit neither the premise nor the conclusion. It is not quite correct to say that no mutual indebtedness existed at the date of the bankruptcy. The capital stock of a corporation is a liability in favor of its shareholders. True, it is not a liability on which an action at law or in equity will lie to enforce a recovery or accounting until cause is shown for a dissolution of the corporation and distribution of its assets. When, however, the legal period for its corporate existence has expired and the work of liquidation for the purpose of winding up its affairs is begun, the corporation and its stockholders assume a somewhat changed relation to

each other. The title to the property remains, of course, in the corporation until the process of liquidation is effected and final division or distribution is made; but, subject only to the payment of corporate debts, it is a title held in trust for the benefit of the stockholders and they may demand and by appropriate action enforce the distribution of the assets in proportion to their several holdings of shares. In this case the legal period of corporate existence had expired, liquidation was in progress, the corporate property had been sold and, so far as may be inferred from the admitted allegations of the petition, the business was ripe for the final act of corporate dissolution. If mutual indebtedness or mutual obligations must have existed at the time of the adjudication of bankruptcy, as appellee contends, in order to preserve the right of set-off in plaintiff, we think that requirement is sufficiently complied with. The corporation was then holding its assets in trust for distribution to the shareholders, including Barnes, and he, or any other stockholder, could have invoked the aid of a court of equity, if necessary, to compel the performance of that trust and the delivery to him of his share. On the other hand, he was indebted to the corporation in a large sum for moneys received by him as its treasurer and unaccounted for. Moreover he was insolvent. Under such circumstances, it would smack of gross injustice to deny to the corporation the right to retain the dividend due to Barnes and apply it in reduction *pro tanto* of the much larger amount due itself.

But irrespective of the technical question whether mutual indebtedness in the ordinary sense of that word existed between the corporation and Barnes when the trustee in bankruptcy succeeded to the title to his estate, we think it sufficient to say that the trustee took the certificates of stock subject to the equities then existing between the bankrupt and the corporation. At that time the sole right in Barnes as a stockholder was the equitable right to receive his proportionate

8. BANKRUPTCY:
trustee's title
to stock hold-
ings: stock
subject to
equities.

part of the assets of the corporation on final distribution less any proper charge or set-off against it. It was this right which the trustee acquired and no injustice is done him or the creditors he represents by denying him more. There was error in sustaining the defendant's demurrer and dismissing the petition.

The judgment of the district court must be reversed and cause remanded for further proceedings in harmony with this opinion.—*Reversed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

FRANK W. MEYERS, Appellant, v. BENNETT AUTO SUPPLY COMPANY et al., Appellees.

MASTER AND SERVANT: Duty to Warn—Self-Evident Dangers.

The master is under no duty to warn a servant of dangers self-evident to anyone, skilled or unskilled.

PRINCIPLE APPLIED: Plaintiff, 33 years old, with good eyesight, had been a competent brick layer for 10 years. He was laying brick and terra cotta over the face of a concrete building. Certain "cups" for electrical fixtures were nailed into the forms and after the concrete hardened and the forms were removed four nails protruded, in part, from the cups. These had to be broken off in order to lay the terra cotta ornaments. Plaintiff came to some of these nails for the first time in his experience, and asked the foreman what to do. The foreman said, "Take your hammer and knock or cut them off." Nothing else was said. It was not in the line of a brick mason's work to break off nail ends. Plaintiff, with his own hammer, struck one of the nails which broke, flew into his eye, and destroyed it. *Held*, the task and the tool were of such elementary simplicity that no duty arose to warn or instruct.

Appeal from Woodbury District Court.—HON. JOHN F. OLIVER, Judge.

MONDAY, MARCH 15, 1915.

ACTION for damages for negligence resulting in injury

to an employee. At the close of plaintiff's evidence there was a directed verdict for the defendant.—*Affirmed.*

Shull, Gill, Sammis & Stilwill, for appellant.

L. H. Salinger, for appellees.

EVANS, J.—Plaintiff was a brick mason and was in the employment of the Lytle Construction Company, engaged as a brick mason in the construction of a building for the Bennett Auto Supply Company. He broke off the end of a nail by striking it with his mason's hammer. The broken piece struck his eye and destroyed it. The specified grounds of negligence are that he was required to do something outside the range of his regular work and was not furnished with a proper tool therefor nor warned of the danger inhering in the task. The salient facts are gathered concisely in the briefs of counsel. We quote as follows from appellant's brief:

STATEMENT OF FACTS.

On or about the 9th day of September, 1912, plaintiff was working as a brick mason in the employ of the defendants in the erection of a concrete, brick and terra cotta building. In the face of said building galvanized iron boxes or cups were to be cemented. These boxes or cups are held in place in the wall by means of soft wire nails or spikes which project outward from the wall until concrete is poured into and about the box and hardened, when that part of the spike which projects is removed or broken off so as to permit covering the box or cup with a terra cotta ornament in which the lights are set. It is the business of the electricians wiring the building to fasten the cups or boxes with the nails and when the concrete has set to remove or break off the nail ends.

For the purpose of removing or breaking off these spike ends pliers are used. The masons then put on the terra cotta ornaments. The plaintiff was a brick mason by trade and

had no experience in breaking off nails or spikes: it is not the line of a brick mason's work to break off nail ends.

On the day in question the plaintiff in the course of his work came across some of the boxes from which the spikes had not yet been removed, and asked defendant's foreman what to do about it; he was negligently instructed to knock or cut them off with his hammer, without any warning as to the dangers incident thereto or instructions as to the manner of removing them with a hammer, which when he did, at the second stroke, part of the spike broke off and struck him in the left eye, blinding it and destroying the entire eye.

The following from appellees' brief amplifies the foregoing:

Plaintiff at the time of his injury was 33 years old. He had been a bricklayer about ten or eleven years. Before that he had tended a bricklayer for about four years, and had done nothing else during those years. Before that he lived on a farm. His eyesight was perfectly good and he describes himself as an equipped, competent and efficient workman.

The building on which he received his injury was constructed of concrete, over which was laid brick and terra cotta. At intervals in the concrete, iron cups were set with their sharp edges flush with the concrete. To hold them in place, they were nailed from behind, and when the forms were removed, four wire nails would protrude outward from each cup, about an inch and a half or a quarter beyond the surface of the concrete walls. These cups were so placed for the purpose of introducing conduits carrying electric light wires, and each cup was to be overlaid with a terra cotta medallion. The terra cotta came right up against the cup, and the nails were in the way of its being so laid. They were in the solid concrete and could not be pulled out.

Plaintiff had worked on this building before, at the same kind of work for about three weeks, but had gone away and had just returned the morning of his injury. He had worked

on concrete buildings before, but never on one with the *lights* sticking out in boxes like this, and though he laid medallions over boxes on this building before, there were no nails sticking from them. He was employed as a brick mason to lay brick and terra cotta.

At the time of the accident, plaintiff was working with one Levolier, and came upon the box at which he received his injury, and was unable to fit the terra cotta on because of the projecting nails. Not knowing but that the nails might have some purpose, he called to the foreman and said "Johnson, there is some nails here, what do you want me to do with them," and Johnson said "Take your hammer and knock or cut them off." This was in the hearing of his fellow workman, Levolier, and no further instruction as to the work about to be entered upon was given by anyone. Levolier proceeded to cut off one of the nails with his hammer. It was a wire nail and a hammer like that used by plaintiff. He was on plaintiff's right side, and the box was between them. Levolier struck his nail and cut it off and received no injury. Plaintiff was standing about two feet from the cup, which was shoulder high, when he struck the nail. He hit it each time with his right hand and with the head of the hammer, and at the second stroke, the nail broke at the point where he had bent it over the edge of the cup and flew into his eye.

Plaintiff's hammer, he says, he used to cut brick and terra cotta. When he struck terra cotta with it, pieces of the terra cotta would probably fall off, according to where he hit it, but they would not fly up in the air, though that would be a good deal according to how you would hold it to cut it. In his work as a brick mason, he had never used his hammer to remove the nails sticking out from the cement or brick. He had used it to remove "obstructions," meaning, he says, cement, boards or brick sticking out. He had used it also to drive in nails sticking out of houses he was veneering with brick.

These statements are fairly consistent with each other

and are sufficient indication of the state of the record. We may add the following excerpts from the testimony of plaintiff:

"I knew it was going to break off, and that is what I struck it for. The only thing I didn't know at the time was that it might fly up. I knew that the piece that broke off had to go somewhere."

"When Levolier struck his nail it flew in a different direction than when I struck mine. He struck his on one side and I struck mine on the other."

"Re-direct. The nail Levolier hit broke off. It was a wire nail. When I hit it the purpose was to cut it off so it would be out of the road."

The argument for plaintiff is that he was only a mason and was ignorant of the danger inhering in other lines of work and that the breaking of the nail in question was outside the range of his work and therefore of his experience. We think it quite inconceivable that a man could become a skilled mason without learning to drive nails, or to bend and break them. The hammer that he used was his own. That it was efficient to accomplish the breaking is conceded. That the broken end of a nail will fly in the direction toward which it is struck is an obedience to the same law that operates upon a piece of concrete or brick under the same circumstances. It was self-evident to any workman whether skilled or unskilled and no amount of skill and experience could make it more evident. The employer could have no reason to believe that the plaintiff did not know it. Therefore no duty to warn arose. The fact that pliers could have been used is not controlling. The task and the tool were of elementary simplicity. Instruction could have added nothing. We think therefore that the verdict was properly directed and the judgment below is—*Affirmed*.

1. MASTER AND
SERVANT: duty
to warn; self-
evident dan-
gers.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

GEORGE W. RAINE, Appellant, v. THE CITY OF DUBUQUE,
Appellee.

MUNICIPAL CORPORATIONS: Defective Streets—Need Not be
1 **Nuisance.** A city cannot escape liability for a defect in its
street on the fact that the defect did not amount to a nuisance.

PLEADING: Surplusage—Non-Necessity to Prove. A party shall
2 not be compelled to prove more than is necessary to entitle him
to the relief asked. (Sec. 3639, Code.)

PRINCIPLE APPLIED: Plaintiff pleaded the negligence of
the city in reference to an obstruction in the street which over-
turned his carriage. He also pleaded that the obstruction was a
nuisance. The court followed the pleading and repeatedly told
the jury that before defendant could recover he must establish
that the obstruction was a "nuisance." *Held*, no allegation was
necessary, in order to hold the city liable, that the obstruction
was a nuisance; therefore the allegation was surplusage.

Appeal from Dubuque District Court.—HON. ROBERT
BONSON, Judge.

MONDAY, MARCH 15, 1915.

ACTION at law to recover damages for personal injury.
Verdict and judgment for defendant and plaintiff appeals.—
Reversed.

Kenline & Roedell, for appellant.

*M. T. Czizek, M. D. Cooney, John D. Denison, Jr., and
E. E. Bowen*, for appellee.

WEAVER, J.—Prior to the accident in which plaintiff was
injured, the defendant city had let a contract for the con-
struction of a sewer along the course of one of its streets
known in the record as West Locust. The sewer had been

constructed, but a considerable quantity of dirt and rock had been left in ridges or piles in a manner to constitute an obstruction of more or less magnitude. It is suggested by some of the witnesses that the dirt and rock had been thus left on the street surface with the expectation that the filling made in the excavation would settle and the material could be utilized in making the necessary refilling. Notice and complaint concerning this condition had been made to the mayor of the city, who visited the place and caused some improvement to be made in the conditions. The contractors were notified "to clean it up except in the ditch and trench itself," and the mayor describes the result to have been that "some places were level and in other places was a ridge." So far as appears, no measures were taken to barricade the place or to place lights thereon at night. It is shown, however, that the contractors had maintained lights along the work while the actual construction was in progress, but they had been discontinued for several days before the night in question. On the night of November 14, 1911, plaintiff was driving a hack along West Locust street when, as the evidence tends to show, his carriage struck the ridge or heap of earth and rock and was overturned, with the result that he received some degree of injury. To recover compensation for the injuries so received, this action was begun.

The petition charges the defendant with negligence in permitting the street to become and remain in the condition complained of and in failing to erect or maintain guards or barriers or warning lights to prevent injury therefrom to persons lawfully using the street. The allegations of the petition are denied by the answer. The issues were tried to a jury and verdict returned for the defendant.

The jury having determined the fact issues adversely to the plaintiff, we have only to inquire whether the record discloses any error to his prejudice requiring a reversal of the judgment entered on the verdict. Bearing upon this propo-

sition, we turn to the court's charge to the jury, to which the plaintiff takes exception.

- Referring to the facts which the plaintiff must establish by the evidence to entitle him to recover, the court charged the jury that he must prove—
1. MUNICIPAL CORPORATIONS: defective streets: need not be nuisance.

"1st. That he was injured by being thrown from a hack caused from an obstruction in said street, and that from such injuries damages resulted to him.

"2d. That the defendant city was negligent for permitting said obstruction to exist, and that said obstruction was a nuisance and caused plaintiff's injury.

"3d. That plaintiff himself, at the time of the happening of the accident was guilty of no negligence on his part which contributed to his injury.

"It is incumbent upon plaintiff to establish and prove each of these three propositions by a preponderance of the credible evidence, and if he has failed to so establish and prove any one of these three propositions your verdict should be in favor of the defendant."

In another paragraph the court said, "It is for you to determine from all of the evidence in this case whether or not the carriage was overturned because of an obstruction in the street, and whether or not such obstruction was a nuisance." And again in the same paragraph, "In this case, it is incumbent upon the plaintiff to prove by a preponderance of the credible evidence that the obstruction in the street overturned the carriage and that such obstruction was a nuisance."

These instructions cannot be approved. They clearly serve to impress upon and emphasize to the minds of the jury that plaintiff must not only prove that defendant was negligent with respect to the condition of the street, but must go farther and prove that such negligent condition constituted a nuisance—and this too without anywhere defining or ex-

plaining to the jury what was or is or would be a nuisance in such case. The same question was before this court in *Stokes v. Sac City*, 151 Iowa 10, where a very similar instruction was held to be erroneous.

It is true the statute charges each city with the duty of keeping its streets free from nuisances, and still another statute makes the obstruction of a public highway an actionable nuisance. But these statutes do not attempt to define or measure the full duty which the law imposes upon every municipality with respect to its streets. It is too thoroughly settled to require discussion or citation of authorities that the city is charged with the exercise of reasonable care to make and keep its streets free not only from defects or obstructions which are nuisances in the technical or statutory meaning of that word, but from all defects, including those of a less flagrant or perilous character, which expose persons lawfully using such streets to danger of injury. Failure to exercise such care is negligence and if thereby a traveler on the public way is injured without contributory fault on his part, the city is liable and the jury in such case should neither be asked or permitted to speculate upon the question whether the negligent condition complained of did or did not constitute a nuisance. The giving of the instructions to which reference is made was a prejudicial error for which there is no remedy except a new trial.

It is immaterial that plaintiff's petition speaks of the alleged defect in the street as a nuisance. It also alleges specifically that defendant was negligent with respect to the condition of the street at the point in question and that by reason thereof plaintiff sustained an injury without contributory negligence on his part. There is a sufficient statement of a cause of action and the use of the word nuisance in connection therewith is surplusage. It is elementary under our system of pleading and practice that a plaintiff is not required to prove the redundant or unnecessary allegations of his petition.

2. PLEADING: surplusage: non-necessity to prove.

This conclusion is determinative of the appeal and it is unnecessary to discuss the other questions raised in argument. The judgment of the district court must be reversed and the cause remanded for new trial.—*Reversed.*

LADD, EVANS, and PRESTON, JJ., concur.

HARRIET L. ROBERTS et al., Appellees, v. GLADYS BISSELL et al., Appellants.

INSANE PERSON: Disclaimer of Interest in Lands—Action to Set Aside—Degree of Proof Necessary. A disclaimer of all interest in lands, the subject of partition proceedings, and the entry of a decree excluding the one filing the disclaimer from all interest in the lands, will not be set aside on the application of a subsequently appointed guardian, except upon very clear and conclusive proof of mental incapacity.

Appeal from Monroe District Court.—HON. D. M. ANDERSON, Judge.

MONDAY, MARCH 15, 1915.

THE opinion states the case.—*Affirmed.*

D. W. Bates, for appellants.

John T. Clarkson, for appellees.

WEAVER, J.—In the year 1876, Nathaniel Roberts died intestate, seized of about 400 acres of land in Monroe county, Iowa. He left surviving him his widow, Sarah Ann Roberts,

who became entitled to one-third of his estate, and several children who each inherited one-tenth of the remaining two-thirds thereof. Thereafter, one of the children died intestate and his one-tenth of two-thirds of said property and estate passed by inheritance to his mother, Sarah Ann Roberts. In the year 1905, the widow being still living, one

1. **INSANE PERSON: disclaimer of interest in lands: action to set aside: degree of proof necessary.**

of the sons, Tryon Roberts, who is appellant herein, executed and delivered to his sisters, Mary J. Hinds and Helen Berner, a conveyance by warranty deed of what was described as "my undivided one-ninth" of the land of which Nathaniel Roberts died seized. In March, 1912, the widow died, leaving a will executed in 1905, by which she devised "the undivided one-third interest" in said lands, describing them, to her "bodily heirs," (naming all the children, including Tryon Roberts) in equal parts, but she failed to devise or dispose of the interest or title which she had inherited from her deceased son. After the mother's death, an action in partition was begun, in which Harriet L. Roberts and others, including Tryon Roberts, were named as plaintiffs and Gladys Bissell and others as defendants. In the petition as originally filed, it was alleged in substance that while Tryon Roberts had conveyed to his sisters the interest or share inherited by him from his father, he had become vested as the devisee and heir of his mother with the title to the two forty-fifths part of the land of which the father died seized. Later, at the instance of the appellant's sister, Mary J. Hinds, an amended petition was filed in which Tryon Roberts was named as a defendant instead of plaintiff. It alleged in substance that the conveyance above mentioned as having been made by Tryon Roberts to his sisters, Mary J. Hinds and Helen Berner, was intended by the parties thereto as a conveyance not only of the share or interest in the land which said grantor inherited from his father, but also the prospective share or interest in said lands which he might thereafter inherit from or acquire through his mother, and that Tryon Roberts was, therefore, not entitled to any part or share in the partition of said lands; but the share which he would otherwise have had belonged in equal parts to his two sisters named as grantees in said deed. In addition to the prayer for partition on the basis set forth in the petition as amended, it was asked that the deed from Tryon Roberts be reformed to effectuate his alleged intent to convey all his actual and prospective

interest in the land. At or about the time of making this amendment to the petition, Mrs. Hinds, without disclosing to Tryon or to any of his immediate family the purpose of her invitation, asked him over the phone to come and see her. He responded to the request and she took him with her to the office of her attorney where an answer to the amended petition prepared by the attorney was signed by him and filed in the partition proceedings. By the terms of the answer, he admits the claim stated in the amendment to the petition, alleges that he sold and intended to convey to his sisters, Mrs. Hinds and Mrs. Berner, all the interest he had then acquired from his father in the lands and all he might thereafter acquire through his mother. He therefore disclaimed all interest in the lands and consented that the relief asked in the amended petition be granted. Thereafter, a decree was entered settling the shares of the various parties in interest on the basis of the allegations of the petition as amended and ordering a sale of the property for the purposes of division and distribution. After the sale and while the proceeds thereof were still in the custody of the court, a guardian was appointed for Tryon Roberts on the application of his son upon the ground that he was mentally incompetent to transact business. The guardian then appeared in the partition proceedings and filed an application setting up the matters and things hereinbefore recited, alleging that at the time Tryon Roberts signed the answer to the amended petition he was mentally disqualified and unable to understand the real nature, force or effect of said pleadings; that as a matter of fact the deed made by him in 1905 was intended to convey and did in fact convey only such interest as he then owned in the property as an heir of his father and that he was induced to sign the answer disclaiming any title or interest as devisee and heir of his mother by reason of misrepresentations made to him by his sister and because of his mental incapacity. Upon this showing, the guardian prays for the vacation of that part of the decree of partition which adjudges Tryon

Roberts to be without title or right to any share in the lands and that he may be adjudged the rightful owner of such share as would otherwise be his as the devisee and heir of his mother. To this application the sister, Mrs. Berner, consents and disclaims any title or interest in herself under the deed of 1905 except to the one-half of the share or interest which Tryon Roberts inherited from his father. The other sister, Mrs. Hinds, insists upon the maintenance of the decree as entered and denies the allegations of the application to modify it.

Upon hearing the testimony, the trial court found the evidence insufficient to justify the re-opening or modification of the decree so far as it relates to the share awarded to Mrs. Hinds, but in view of the disclaimer by Mrs. Berner, the decree was modified by awarding to and confirming in Tryon Roberts the one-half of the interest or share which he acquired in the property as the devisee and heir of his mother. From that part of the decree which denies to Tryon Roberts the relief asked against Mrs. Hinds, the guardian has appealed.

A reading of the testimony leads us to the conclusion that while Tryon Roberts is not a man of strong mentality or marked force of character, there is no very persuasive evidence that he was incompetent to understand and appreciate the meaning and effect of his disclaimer of interest in the land and his consent to the entry of the decree which his guardian now seeks to set aside. Had defense been made in proper time to the claim set up by Mrs. Hinds, the court might well have refused, and doubtless would have refused, to give the deed of 1905 any other effect than that of a conveyance of the title and interest acquired by Tryon Roberts as heir of his father; but having confessed the allegations of the amendment and consented to a decree against him and the court having entered such decree, it cannot properly be vacated and partition be ordered on another and different basis except upon very clear and conclusive proof of mental incapacity. The claim asserted against Tryon Roberts is not free from the odor of greed and

selfishness and cunning, but he deliberately waived his right to object thereto while the court was open to his plea and consented that the claim should be established and confirmed, and we think the adjudication so had cannot be disturbed.

The decree appealed from must stand and it is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. WILLIAM STALKER, Appellant.

CRIMINAL LAW: Incest—Prosecutrix as Accomplice—Corroboration. The defendant in a charge of incest may be convicted on the uncorroborated testimony of the prosecutrix unless she consents to the act and thereby becomes an accomplice. Non-consent may arise, of course, from immature years.

PRINCIPLE APPLIED: In instant case, the child being less than 13 years of age when the offense was committed, defendant was held to have no cause to complain that the court submitted to the jury the question whether prosecutrix had sufficient mental capacity to entertain a criminal intent, and there being no corroboration, the jury was told to acquit unless they found such incompetency beyond a reasonable doubt. There was evidence to support a finding of mental incompetency to entertain a criminal intent, and as the instruction was not excepted to because it cast too great a burden on defendant, there was no just ground for complaint.

Appeal from Polk District Court.—HON. W. H. McHENRY, Judge.

MONDAY, MARCH 15, 1915.

DEFENDANT was indicted, tried, and convicted of crime of incest; and from the judgment imposed, appeals.—*Affirmed*.

Walter McHenry and Earl DeFord, for appellant.

George Cosson, Attorney General, W. S. Rankin, Special

Counsel, and *Thomas J. Guthrie*, County Attorney, for appellee.

DEEMER, C. J.—The crime is alleged to have been committed upon Gladys Beebe, who was 13 years of age on the 8th day of March, 1913. It is claimed that the offense was committed in December of the year of 1912.

1. CRIMINAL
LAW: Incest:
prosecutrix as
accomplice:
corroboration.

Prosecutrix is the step-daughter of the accused, and she testified to acts of intercourse with him, beginning in December, 1912, and continuing down until sometime in March of the year 1913, when it was discovered that she was pregnant. There was no testimony which tended to corroborate the prosecutrix and the conviction must depend upon her testimony alone.

There is some testimony tending to show that the defendant had an opportunity to commit the offense in December, 1912, but otherwise she is in no way corroborated, save that she became *enciente* as a result of her intercourse with someone.

No testimony was offered for the defendant and the case went to the jury upon instructions which are not complained of as abstract propositions, but which the defendant insists were prejudicial to his case and inapplicable to the testimony adduced. These instructions are as follows:

“It is presumed by the law that any person between the ages of seven and fourteen years is incapable of entertaining a criminal intent and a person incapable of entertaining a criminal intent cannot be an accomplice in a crime. If the witness, Gladys Beebe, at the time of the acts of intercourse charged in the indictment, as shown by the testimony, if any such occurred, was incapable of entertaining a criminal intent, then she would not be an accomplice in the crime. But if she did have sufficient mental capacity to entertain a criminal intent; that is, to distinguish between right and wrong and sufficient mental capacity to intend to do the

wrongful act, then she could be an accomplice in the crime even though she was under the age of fourteen years.

"The presumption as to incompetency of a person between the ages of seven and fourteen years is a presumption of law, which simply means that you will assume in the beginning before any evidence is introduced, that such person is incapable of entertaining a criminal intent. This presumption, however, is rebuttable. That is, it may be shown that a person under fourteen years of age is capable of entertaining a criminal intent. This presumption may be rebutted by any evidence in the case. And therefore, in determining whether or not the said Gladys Beebe did have sufficient mental capacity to entertain a criminal intent, you will take into consideration all the circumstances of the transaction as disclosed by the testimony, and the manner of her testifying, and all the testimony which you may think throws light upon that subject. The presumption of incompetency as to Gladys Beebe and the presumption of innocence of the defendant, are both in force at the same time. If the evidence fails to disclose that Gladys Beebe did have sufficient mental capacity to entertain a criminal intent, as hereinbefore defined, you will not be justified in assuming that she did have such mental capacity; if you have a reasonable doubt of the guilt of the defendant he is entitled to an acquittal.

"You have already been instructed that Gladys Beebe could not be an accomplice unless she had sufficient mental capacity to entertain a criminal intent. If you find that Gladys Beebe was not an accomplice under this definition, then you are instructed that it is not necessary that her testimony should be corroborated by other evidence tending to connect the defendant with the commission of the crime; if you find that there was a crime committed. And further you are instructed that if an assault is committed upon a woman, and carnal knowledge of such woman is had by force and violence and against her will, then she would not be an accomplice no matter what her age was and her testimony would

not be required to be corroborated. You are instructed in this case, however, that the testimony is not sufficient to sustain a conviction of this defendant upon the theory that intercourse with Gladys Beebe was accomplished by fraud or force and violence. Before such condition could exist, said Gladys Beebe would be required to resist the act of intercourse to the full extent of her physical power and if at any time her resistance was changed to consent before that act was accomplished, she would then no longer be resisting and the crime then would not be accomplished by means of fraud or force and violence. Where the crime of incest is accomplished by force and violence and against the consent of the woman, it constitutes what is known in the law as a rape. Yet the fact that it is rape does not prevent its being incest under the statute which covers this. But as stated above the testimony in this case will not support a conviction of rape committed by physical force and violence and against the consent of the woman.

“Therefore unless you shall find in this case, beyond a reasonable doubt that Gladys Beebe was mentally incompetent, by reason of her youth to entertain a criminal intent, you should find this defendant not guilty. The intent with which an act is committed is a mental state only, and direct proof of it is not required; nor can it ordinarily be shown by direct proof. Intent is a purpose formed to do or not to do something; and the intent of a person in doing a thing may be inferred from the acts done, the nature and character of the act and from the manner in which or the circumstances under which they were done as disclosed by the evidence.”

The real point to appellant's argument is that these instructions are incongruous, in that in finding that prosecutrix was not an accomplice, the jury had to determine that she was not of sufficient mental capacity to understand the nature and character of her act with the defendant; unable

to distinguish between right and wrong,—saying at the same time, however, that if such were the facts, her testimony might be given weight, and conviction had upon that alone; but that if she were of sufficient mental capacity to join in an offense, the defendant could not be convicted unless she was corroborated.

This, doubtless, is the result of the rule, but it is not so incongruous as defendant would have us believe.

The witness, no matter what her age, was competent, and corroboration was only required in the event she was *particeps criminis*.

It is well settled in this state that one cannot be an accomplice to either the crime of adultery or incest, unless she consents to the act and is in fact guilty of it herself. Therefore, if from infancy or any other cause she is unable to consent, she is not an accomplice. But it is nevertheless true that a defendant may be convicted upon her testimony alone, if the jury think she spoke the truth. See *State v. Chambers*, 87 Iowa 1.

The court might well have said that as the prosecutrix in this case was incapable of consenting to the acts of intercourse, she was not in fact an accomplice, instead of submitting the question of mental capacity to the jury. That it did not do so is no ground for complaint on the part of the defendant. This observation is made simply to show that conviction may be had upon the testimony of an immature woman; whereas, if she were mature and consented to the act, conviction could not be had on her testimony alone.

As the prosecutrix in this case was under the age of consent, we need not scrutinize very carefully the testimony in support of the instructions given; for notwithstanding the evident maturity of the girl, while a witness on the stand, the jury may well have found that she did not possess such capacity as to know the nature and character of her actions, their consequences, and their moral obliquity.

Our conclusions are supported by: *State v. Sander*, 30

Iowa 582; *State v. Donovan*, 61 Iowa 278. See also: *Commonwealth v. Bakeman*, 131 Mass. 577.

In the *Chamber's* case, *supra*, the court said:

"Guilt may exist and is none the less enormous, because the act was without the consent of the female. To hold otherwise, is to say that the crime of incest cannot be committed with one who, from infancy or other cause, is incapable of consenting to the act. Sarah D. Cowden was but little over thirteen at the time this crime is charged to have been committed; and, although it does not appear that she resisted the approaches of her stepfather, it can hardly be said that she so consented as to become his accomplice in the commission of the crime."

No error appears, and the judgment must be and it is—*Affirmed*.

LADD, EVANS and PRESTON, JJ., concur.

FRANK YOUTSEY et al., Appellees, v. T. F. LEMLEY, Appellant.

PARTNERSHIP: Authority of Partner—Private Affairs of Co-
1 Partner. It is very elementary that a partnership relation alone gives one partner no authority to contract with reference to the private contracts of his co-partner.

PAYMENT: Pleading—Burden of Proof. Payment is an affirmative
2 defense with the burden of proof on him who alleges it.

EVIDENCE: Opinions—Conclusions—Justifiable Exclusion. The ex-
3 clusion of a question so framed as to strongly suggest a conclusion-answer is especially justified (a) when the party making the inquiry makes no suggestion as to what he expects to prove, and (b) the witness was not thereafter questioned as to any specific facts in reference to the matter.

NEW TRIAL: Newly Discovered Evidence—Diligence. "Due dili-
4 gence" in the discovery of new matters of evidence is not shown
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when such new matters might have been readily brought out from the same witness when he was testifying at the trial.

Appeal from Lucas District Court.—HON. F. M. HUNTER,
Judge.

MONDAY, MARCH 15, 1915.

THE opinion states the nature of the action and the material facts.—*Modified and Affirmed.*

Hickman & Wells, for appellant.

J. A. Penick and E. A. Anderson, for appellee.

WEAVER, J.—The action was brought at law to recover a money judgment. The petition is not set forth in the abstract, but we infer from matters stated or assumed by the parties in the record presented that the claim sued upon was in substance that defendant had served as plaintiff's agent in the sale of certain automobiles and had failed to account for and pay over to his principals certain moneys coming into his hands on their account. To this petition, defendant filed an answer alleging full performance by him of his written contract with the plaintiffs and further set up a counterclaim to the effect that plaintiffs were indebted to him for commissions earned in the sale of certain automobiles and for other commissions on sales negotiated by him for the completion of which plaintiffs neglected or failed to furnish or deliver the necessary cars and also for the one-half of the necessary expenses of the agency, making an aggregate sum of \$400 for which he demands recovery.

When the case came on for trial, the plaintiff Youtsey was ill and unable to be present and the petition was voluntarily dismissed without prejudice. Defendant refused to dismiss his counterclaim and plaintiff pleaded thereto and trial was had to the court on the issues so joined. It must be said that the issues are not clearly stated in the abstract and seem to involve controversies which, on plaintiff's theory

of the facts, would seem to be improperly joined, but no objection is raised on that score, and perhaps the real nature of the case will be best apprehended by setting out the findings and conclusions which the trial court reduced to writing and filed in the case. They are as follows:

FINDINGS AND CONCLUSIONS.

In the above cause it is found:—

1. From March 1st to December 12th, 1912, Frank Youtsey and Bert Vaughn were co-partners under the name of the Blue Grass Auto Company, engaged in the selling, as agent, of automobiles at Chariton, Iowa, and that T. F. Lemley was a sub-agent of the co-partnership selling automobiles at Russell, Iowa, on a share of fifty per cent of the commissions earned from the sales made by him of automobiles.

2. Under an arrangement between Frank Youtsey and T. F. Lemley, Youtsey was to have all of the commissions earned on the sale of the first five cars sold by Lemley, and neither Bert Vaughn nor the Blue Grass Auto Company at any time had any interest in said commissions.

In the remainder of commissions derived from the sale of other cars by Lemley the Blue Grass Auto Company was to receive one-half of the commissions and is liable for one-half of the expense of making the sales by Lemley at Russell.

3. There is no evidence before the court showing that Frank Youtsey ever authorized Bert Vaughn to enter into the agreement with Lemley which written agreement is in evidence as exhibit one, or that he ever knew it was entered into or was conversant with the contents thereof, and there is no evidence that he ever authorized the Blue Grass Auto Company to collect the commissions on the first five cars sold by Lemley or to, in any manner, be interested in said commissions.

The claims in the pleadings and on the trial of the case, made by Lemley are as follows:

(A) Claim for \$120.00 of the commissions on sale of a Chalmers car to E. A. Smith, is not established.

(B) Claim for \$75.00 of the commission of sale of the Overland car to Charles Allen, is established in that amount.

(C) Claim for one-half of the commissions amounting to \$150.00 on three cars which Lemley claims to have sold and which cars were not furnished by the Blue Grass Auto Station, is not established.

(D) Claim for \$45.00 due on expense account. The evidence shows as an expense, covered by the arrangement between the parties, rent to the amount of \$16.00, one-half of which, \$8.00, is established, the remainder of this item is not.

On the claim made by Frank Youtsey for commissions on the sale of the first five cars it is found that he received and accepted as commission on one of the cars a secondhand car that was received as a part of the sale price of one of the five cars. The commissions on the remainder of the five cars amount to \$432.00. It has not been established that the check exhibit 3 in evidence, executed by T. F. Lemley and in favor of Bert Vaughn for \$342.40, was a payment on the commissions due Frank Youtsey on the first five cars sold by him, and if it was so intended by Lemley then it is not established that Vaughn had any right or authority to receive the check, or that he ever delivered the money or any part of it to Frank Youtsey, and therefore cannot be allowed as a credit on this claim made by Youtsey.

RECAPITULATION.

Amount found due T. F. Lemley from Blue	
Grass Auto Co.....	\$ 83.00
Amount found due Frank Youtsey from T.	
F. Lemley	432.00
Balance in favor of Frank Youtsey and	
against Lemley	349.00
The plaintiff shall pay one-third of the costs, and the de-	

defendant Lemley the remainder. Judgments to be entered accordingly. September 13, 1913.

From this judgment defendant has appealed.

I. The first exception argued is that the findings of the trial court are not supported by the evidence.

The largest item in dispute is a claim made by the plaintiff Youtsey for the commission or profit on four Ford cars. The substance of his claim is that he personally purchased from the defendant an agency contract for Ford cars within a certain territory and that as a part of the consideration of said purchase, defendant undertook to act as his sub-agent

1. PARTNERSHIP:
authority of
partner: private
affairs of
co-partner.

and to sell for him five Ford cars without commission and to account to said Youtsey for all the profit arising from such sales. It is plaintiff's further claim that a partnership entered into by him with one Vaughn about that time or soon after the purchase of the agency had no interest in the commission or profits from the sale of the five cars here mentioned. Defendant does not deny his undertaking to sell the five cars without commission but avers that the agreement with Youtsey was made for the partnership of Youtsey and Vaughn or the "Blue Grass Auto Company," under which name it conducted its business. In any event, he says the original contract was merged in a written contract afterward made between him and the partnership, acting by Vaughn, and that in pursuance of such agreement he accounted for and paid the promised commission or profits to Vaughn for the benefit of the firm. Youtsey denies the authority of Vaughn to contract with reference to these commissions or collect them and avers that the same have never been paid or accounted for. This dispute was decided by the trial court in favor of Youtsey, and if there was any substantial conflict in the evidence upon this proposition, the finding of the court is the equivalent of a jury verdict and we cannot properly disturb it. We have examined the record in this respect

and are satisfied that the finding complained of has fair support in the testimony. Indeed defendant's own testimony is to the effect that the original deal was between him and Youtsey individually. He says, "I was in the automobile business prior to the time Mr. Youtsey went into the business. I sold out to him. He paid me \$800 for my contract and the selling of five cars. I contracted with him in regard to remaining in possession and selling the Ford automobiles. The last contract was made with the Blue Grass Auto Company of which he was a member. I then continued to sell Ford automobiles under this subsequent contract and the only contract I had with reference to commissions was made with the Blue Grass Auto Company of which Mr. Youtsey was a member." As this statement clearly supports and corroborates the plaintiff's theory of the facts, the court was justified in finding that the agreement to account for the entire profits on the first five cars sold was made with Youtsey and that he alone was entitled thereto. The credit given him by the court in making up the account must therefore be sustained, unless we are to hold that the contract subsequently made between defendant and the Blue Grass Auto Company, acting by Vaughn, operated to transfer the credit due Youtsey to the account of the partnership and that defendant has paid or accounted to it for that amount. Counsel for appellant seem to argue that it was within the authority of Vaughn as a partner to thus make the debt due from defendant a subject of contract between the partnership and defendant and thus work a transfer of the credit. But this cannot be correct. Doubtless Vaughn as partner had authority to bind his firm by contract with defendant concerning dealings already had between him and the firm as well as the terms on which their business should thereafter be conducted, but this did not, and under the most elementary principles of the law of partnership could not, authorize him in his own name or in the name of the firm to enter into any contract or agreement by which the debt due Youtsey alone should become due to the firm or

to authorize the payment of the debt either to Vaughn or to the firm. At the time this contract was made with Vaughn, Youtsey had become sick and so far as appears was not then nor was he afterwards able to transact business. There is no evidence that he had any actual knowledge or notice that Vaughn had assumed authority to make any agreement affecting his right to the profits on the five cars or that defendant claimed to have paid or accounted therefor to Vaughn. It is true that when her husband became disabled, Mrs. Youtsey undertook to exercise some degree of care over his business interests, but it is made evident from defendant's testimony that he resented her interference and refused to acknowledge any authority on her part and dealt solely with Vaughn. She testifies that she had no knowledge of the contract with reference to the five cars mentioned, and that while she had information that an agency contract had been made between defendant and the partnership acting by Vaughn, it was never shown her and she had no knowledge of its terms in this respect until the partnership was dissolved, December 12, 1912. This evidence is also sufficient to sustain the trial court in failing or refusing to hold that plaintiff had ratified the act of Vaughn.

Again, were we to assume that a payment to Vaughn or to the firm would be a defense to this action, such defense is of an affirmative character and the burden was upon defend-

ant to establish it by a preponderance of the evidence. We are quite certain that he failed to make such conclusive showing of payment to the firm that we can say the fact is established as a matter of law. In fact his testimony is quite unsatisfactory. When first upon the stand he testified that the money for the profits on the five cars had been paid by him into the bank to take up a note given by the firm. Near the close of the trial, he was recalled and testified that the greater part of the claim had been paid by a check of \$342.40 made payable to Vaughn personally. He had no book account of the matter and much

2. PAYMENT:
pleading: bur-
den of proof.

of his statement in reference to it is in the nature of broad conclusion, as for example, "I paid them all that was coming from the profits." "I settled up with Vaughn after I sold those cars and paid him off all that was coming to him." "I made a report to Mr. Vaughn when we settled up. I would make a few deals and come down and figure how things stood and we settled up. That is the only kind of a settlement I made. At these times I paid him all the commissions that were due him. I do not recollect how much it was." Even when he had refreshed his memory by the discovery of the check, the most he could say was, "I think the profits of the first four cars were included in that settlement." Being asked by his counsel to refer to his book and satisfy himself on that subject, he then answers, "Yes, that is the way it was;" and yet he immediately proceeds to say, "I kept no books except a fly leaf book and whenever I made a settlement I tore it off. Did not keep any record. Have nothing in my possession whereby I could refresh my memory and be able to tell the court the items which entered into settlements in regard to profits or commission due the Blue Grass Auto Station Company from the sale of Ford cars. I have no record in regard to these matters." To put it very mildly, evidence of this kind can hardly be said to establish payment beyond dispute. Nor does Vaughn, when called in corroboration, make the case any clearer. Being asked whether that check was paid as a balance due on settlement between him and Lemley and included the first four cars, he said, "Yes, sir; that is in one settlement but I cannot say whether it is the first settlement. That check was given for a settlement between the Blue Grass Company and Lemley for the commission on cars and accessories due at the date of the check. Could not say whether it was settlement due at that time in full or not." Taking the record in this regard as a whole, it affords sufficient support of the plaintiff's claim and the finding of the trial court cannot be set aside.

Of the defendant's claim for one-half the commission on

the sale of three cars other than Fords, no question is made except on the issue of fact. Under the contract for sales so procured by him, he was entitled to receive one-half of the commission earned. The controversy is over the question whether these sales were induced or brought about by the act or effort of the defendant. The court below found in his favor as to one of them and against him on the other two. Without extending this opinion to set out the testimony, we think it sufficient to say that these findings have support in the record. It is not our province to pass upon the credibility of the evidence or upon its preponderance. It is sufficient if there be any evidence which if believed by the trial court fairly tends to support its findings, and such we find to be the case.

The only other item of counterclaim is for agency expenses which under the contract were to be shared equally. The amount is alleged to be \$45. As a witness, defendant testified, "There was a balance due me at the commencement of this action for expenses as sub-agent of about \$45." On further examination, he was unable to state any item of this expense except a matter of two months' rent at \$8 per month. On this showing the court allowed him for one-half the rent, \$8.00, and for no more. The correctness of this finding is not open to question. As an agent claiming reimbursement for expenses, it was incumbent upon him to make a showing of the facts from which the nature, amount and propriety of the expenditures may be ascertained. A general sweeping swear to the conclusion that "there is a balance due me for expenses of about \$45" proves nothing.

The only finding of fact to which an exception can be sustained is that in computing the amount of the commission or profit on the five cars for which defendant should be held to account, there appears to have been a mistake of thirty dollars. It is shown without dispute that the commission on one of these cars was received by Youtsey in the form of an old car taken in exchange, and defendant is therefore charge-

able in this action with commission on four only, which he says he sold at substantially schedule prices. Of the four, two were touring cars at the schedule price of \$720 each and two roadsters, at \$620 each. The commission on these sales at fifteen per cent, the agreed rate, is \$402, instead of \$432 as found by the trial court. The mistake was evidently made in assuming that the four cars were all of the touring car model and charging up each at the full rate of \$720.

II. Vaughn, being examined as a witness for the defendant, was asked to state, "What if any of the profits or commissions on any of these cars sold by Lemley remains unsettled for, other than the last two Ford cars?"

3. EVIDENCE: To this, plaintiff's objection that the question
opinions: con- was leading, incompetent and not rebuttal was
clusions: justi- sustained and defendant assigns error there-
fiable exclu- on.
sion. While the answer might have perhaps been admitted without prejudicial error, its exclusion may be approved on several grounds. The question in effect would permit the witness to draw his own conclusions as to what amounts to a settlement. The defendant did not, by suggestion or offer, disclose what facts he expected to elicit from the witness by the question objected to. Again, if the witness had knowledge of any specific fact or facts bearing upon the controversy whether plaintiff's claim had been paid or otherwise adjusted, his attention could easily have been directed thereto and his answers would presumably have been admitted by the court. Still further, this witness had in fact been interrogated concerning his knowledge of the details of the business and of his own part therein, and the inquiry was in effect a request for him to state the legal effect of his own acts in the premises.

The wife of Youtsey, testifying in his behalf, was permitted to say that under the terms of the purchase of the Ford agency, it was agreed that the commissions on the five cars which the defendant undertook to sell should be paid to her husband, and this is said by appellant to have been

incompetent because it tends to contradict or vary the terms of the written contract. This objection is disposed of adversely to the appellant by our holding that the written contract referred to, made by Vaughn in the name of the partnership, is void and of no effect in so far as it attempts to dispose of a credit due to Youtsey in his private or individual capacity and that no ratification of such contract by Youtsey was shown.

III. Error is also assigned upon the refusal of the trial court to grant a new trial because of the alleged discovery of new evidence tending to support the defendant's case. The

4. NEW TRIAL: basis is the affidavit of one Rockey, cashier
newly discovered evidence: of a bank with whom the parties had done
diligence. business, to the effect that Youtsey borrowed

the money from the bank on his individual notes, with which he made the original purchase from defendant, and ten days later, not being paid, the note was renewed by Youtsey, who represented or promised that Vaughn would also sign the paper, and that thereafter, at the request of Youtsey or his wife, the affiant presented the note to Vaughn for his signature and he signed it. He also states that the note was afterward paid by Mrs. Youtsey. There was no error in denying the motion. The witness was a man well known to all the parties, a resident of the neighborhood and was in attendance on the trial below. The fact that Youtsey had borrowed the money from the bank was developed on the trial and it naturally suggested further inquiry by the defendant into the history of that obligation, how it was paid and whether Vaughn had any interest in the transaction. This was not done and the witness was not called. It cannot well be claimed that due diligence has been shown on part of appellant. It may also be said that conceding the truth of the affidavit, it is just as consistent with the theory that Youtsey was the real or principal debtor and Vaughn a surety only as it is with the theory that the debt was a partnership debt or that Vaughn had acquired any property right

or interest in the commissions or profits, which it is clearly shown were by the original agreement between defendant and Youtsey to belong to the latter. Sufficient ground for the granting of a new trial was not shown and the motion was properly overruled.

For the reasons stated, the judgment of the district court will be modified by deducting thirty dollars from the amount of plaintiff's recovery as of the date thereof and as thus modified it will be affirmed. The costs of this court will be taxed three-fourths against the defendant and one-fourth against the plaintiff.—*Modified and Affirmed.*

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

C. E. ALBROOK, Appellee, v. WESTERN UNION TELEGRAPH Co.,
Appellant.

DAMAGES: Avoidable Consequences—Contributory Negligence—

- 1 **Distinction Between.** The principles that (1) "plaintiff cannot recover for avoidable consequences," and (2) "plaintiff cannot recover if guilty of contributory negligence," while often producing results closely resembling each other, are yet separate and distinct. The former is a rule of limitation upon plaintiff's recovery; the latter defeats the action itself.

PRINCIPLE APPLIED: Defendant negligently failed to deliver a death message. Plaintiff claimed the delay prevented him from reaching the place where his mother died and participating in the funeral arrangements as he otherwise would, with consequent mental pain to him. The addressee might have telephoned to his relatives at the place of death in regard to the funeral arrangements after the message was delivered but did not. *Held*, the failure to telephone did not constitute contributory negligence, defeating the action, but simply limited the recovery. *Held*, defendant was sufficiently protected by a direction to the jury to consider such fact in mitigation of damages.

APPEAL AND ERROR: Instructions—Presumption That Jury

- 2 **Obedied.** It will be presumed that the jury obeyed the instructions of the court.

PRINCIPLE APPLIED: Plaintiff, because of negligence in the delivery of a death message, claimed that he suffered mental anguish, and consequent damages because of two things, to wit:

1. Failure to participate in the funeral arrangements as soon as he otherwise would, and
2. Failure to meet his relatives as soon as he otherwise would.

The court did not treat these as different elements of damages, but instructed on the measure of damages that the jury "must be governed by the facts shown by the evidence in the case." *Held*, if it be conceded that there was no evidence that plaintiff suffered any mental anguish and consequent damages by not meeting his relatives as soon as he otherwise would, it will be presumed the jury obeyed the instructions and returned no damages on an issue on which there was no evidence, the verdict having support if the entire amount returned was for damages by reason of failure to participate in the funeral arrangements.

TELEGRAPHS AND TELEPHONES: Death Message—Delayed Delivery—Mental Anguish—Evidence—Sufficiency. Evidence reviewed and *held*, in an action for negligent delay in delivering a death message, that plaintiff suffered mental anguish and consequent damages by not meeting his relatives as soon as he otherwise would.

TRIAL: Instructions—Correct But Not Explicit—Waiver. If instruction is correct, as far as it goes, though not as explicit or limited as desired, request must be made for the more explicit or limited instruction, or the right thereto, if it exists, will be waived.

PRINCIPLE APPLIED: Plaintiff sought to recover damages for mental anguish in not meeting his relatives as soon as he otherwise would, because of negligence in delaying the delivery of a death message. Court made no distinction in the instructions between relatives by consanguinity and affinity. *Held*, if defendant desired an instruction for the jury to eliminate the "brothers-in-law" from consideration, it should have so requested, and not having done so, waived the right.

TELEGRAPHS AND TELEPHONES: Death Message—Delayed Delivery—Proximate Results. A death message carries a common-sense suggestion that negligent delay in delivering will bring grief to someone, and just how need not be brought to the attention of the one assuming the duty to deliver.

PRINCIPLE APPLIED: A death message, negligently delayed in delivery, advised plaintiff that his mother could not live. *Held*, recovery might be had, among other elements, for mental anguish suffered by plaintiff, in not being able to meet his relatives, attending the funeral, as early as he otherwise would.

DAMAGES: Death Message—Delayed Delivery—Excessive Verdict—

6 **When Disturbed.** The fact that the jury allowed a greater sum for mental anguish than the appellate court would have allowed is not sufficient to overthrow the verdict. Passion and prejudice must appear.

Appeal from Webster District Court.—HON. R. M. WRIGHT,
Judge.

SATURDAY, DECEMBER 19, 1914.

REHEARING DENIED TUESDAY, MARCH 16, 1915.

ACTION for damages because of the negligent delay of the defendant company in the transmission and delivery of a telegram. There was a trial to a jury and a verdict and judgment for plaintiff. The defendant appeals.—*Affirmed*.

Geo. H. Fearons, Thomas A. Cheshire, and Healy, Burnquist & Thomas, for appellant.

Kenyon, Kelleher & O'Connor, for appellee.

PRESTON, J.—The grounds of negligence alleged are substantially that the defendant was negligent in failing to transmit the message with reasonable dispatch and without unreasonable delay; and that the defendant was negligent in failing to transmit and deliver the message to plaintiff within a reasonable time after it was filed with and delivered to the agent of the telegraph company; and that the defendant and its agents and employees failed to forward and deliver the message with fidelity and without unreasonable delay as required by the statute. As to the damages sustained, the plaintiff alleges that because of said unreasonable delay he did not arrive at Ames, Iowa, in time to make and participate in the

preliminary arrangements for his mother's burial, as he otherwise would, nor was he able to reach said Ames and meet his other relatives who were present, as early as he otherwise would. That because of the negligence of the said defendant and the unreasonable delay in forwarding and delivering said message, the plaintiff was caused to suffer grief and mental anguish and pain, to his damage. The message was delivered to the defendant at 10:00 o'clock in the evening of February 28, 1912, by F. C. Tilden, a brother-in-law of the plaintiff, and is as follows:

Ames, Iowa, Feb. 28, 1912.

C. E. Albroom, C/O Clerk of Court, Clarion, Iowa.

Mother cannot live. Heart action bad. Nothing more to do.

F. C. Tilden.

The operator at Ames testifies that the telegram was sent out between 10:00 and 11:00 o'clock that night. At that time Judge Albroom, the plaintiff, was holding court at Clarion. The telegram was not delivered to plaintiff until 8:45 o'clock of the morning of February 29th. Plaintiff's mother died at about 12:00 o'clock, or midnight or a little after, of the 28th. Before the telegram was delivered on the morning of the 29th, and at about 8:00 o'clock that morning, the plaintiff received a telephone message from his relatives in Ames that his mother was dead; and at this time he was told that preparations for his mother's funeral would be delayed and nothing would be done in regard to the funeral arrangements until plaintiff arrived. Some of the funeral arrangements were in fact delayed until his arrival, but before that an undertaker had been selected and the body embalmed and dressed. The distance from Ames to Clarion is about sixty-three miles, and from Clarion to Eagle Grove about nine or ten miles. Although it was winter time and there was some snow on the ground, the roads were good. If plaintiff had received the message at any time up to 6:00 o'clock on the

morning in question, he would have driven to Eagle Grove in time to have taken a train there at 7:40 o'clock and would have arrived in Ames at about 9:30 o'clock that morning. As it was, the first train, after he received the telegram, left Clarion about 12:00 o'clock noon, and there was a wait of two or three hours at Eagle Grove. Plaintiff arrived at Ames about 6:00 o'clock P. M. of the 29th, or a delay of about nine hours. The office of the defendant company at Clarion was open for business at the time in question from four o'clock in the morning until 9:30 o'clock in the evening. The trial court instructed the jury that such hours were reasonable hours and that the defendant was not required to receive a message at Clarion between the hours of 9:30 P. M. of February 28th and 4:00 A. M. of the 29th day of February. At that time there was long distance telephone service between Clarion and Ames, and the telephone exchange at Clarion was open as early as 4:00 o'clock in the morning. After the plaintiff received the telegram, he could have communicated with his relatives at Ames but did not do so. At the time of her death and for a few months prior thereto, the plaintiff's mother lived with her daughter, Mrs. Tilden, at Ames, Iowa. The mother was eighty-nine years old. Previous to her death the relationship between plaintiff and his mother was close, intimate and affectionate. Plaintiff saw his mother a few days before at Clarion. At that time, her health was not as good as it had been, but there was nothing alarming in her condition. He had been making daily inquiries by telephone to ascertain if any serious complication had set in. Plaintiff's home was at Eldora. When the plaintiff arrived at Ames, his youngest and oldest sister and a brother were there. His oldest brother and his wife arrived after the plaintiff. While the record does not show the exact hour of the arrival of those who had arrived before plaintiff, it does show that Mrs. Tilden, plaintiff's sister, was there at and from the time of the mother's death, and had plaintiff arrived there as early as 9:00 o'clock of the morning of the 29th, he would have then met Mrs. Tilden and would have met the other sisters

and brothers, except his oldest brother who came in after that and before plaintiff arrived at 6:00 o'clock. Plaintiff could have met some of them as early as 9:00 o'clock on the morning of the 29th had he been there. There was a telephone at the home of the clerk of the court. The depot where the defendant had its office was only two or three blocks away from the court-house in which plaintiff stayed. The defendant does not show but that the message was in the Clarion office to be delivered as early as 4:00 o'clock in the morning, at which time the telephone exchange was open. The evidence was such that the jury could have found that the message should have been delivered to plaintiff a short time after 4:00 o'clock in the morning. It does not appear that defendant made any effort to deliver the message until 8:45 o'clock that morning. There was no difficulty in locating the party to whom the message was sent. Other facts will be referred to in connection with different points argued and are omitted now to avoid repetition.

The jury was amply justified in finding that the defendant was negligent and that the plaintiff's delay in reaching Ames was chargeable to the delay on the part of defendant in delivering the message. In fact, it is not claimed that defendant was not negligent and no excuse is offered in argument. The errors assigned are grouped under three heads: contributory negligence, elements of damages, and excessive damages.

1. It is urged by defendant that because plaintiff did not communicate with his relatives at Ames by telephone during the day and failed to use the facilities at hand to make any suggestions as to the arrangements for his mother's burial, plaintiff was thereby guilty of contributory negligence, or at least that it was a question for the jury. With this thought in mind the defendant requested the court to submit to the jury the following four instructions, numbered I, III, IX and X, respectively:

1. DAMAGES:
avoidable consequences:
contributory negligence:
distinction between.

I.

"You are directed to return a verdict for the defendant.

III.

"Plaintiff admits that he talked with his relatives at Ames by telephone and that he could at any time have conversed with his relatives at Ames over the telephone, and made known his wishes respecting the preparation of the body of his mother for burial and other preliminary arrangements for the funeral, and his failure to make use of the means of telephonic communication constituted contributory negligence, and you will therefore return a verdict for the defendant.

IX.

"You are instructed that the principle that it is the duty of a person injured by the negligence of another, to do what he can to mitigate the damages, and that he cannot recover the enhanced damages consequent upon his failure in this respect, is applicable to the case under consideration. Applying this principle to the facts in this case, if you find that plaintiff by using the telephone, could have conferred with his relatives in Ames with respect to the preliminary preparations for the funeral of his mother, and failed to do so, when if he had availed himself of this means of communicating with them he could and would have relieved himself of mental anguish and suffering, in whole or in part, then you should find that he was guilty of contributory negligence and cannot recover.

X.

"It was the duty of the plaintiff to exercise ordinary care to relieve himself from injury or damage on account of any negligence of the defendant, if you find that the defendant was negligent. If, therefore, you find that by telephoning to his relatives at Ames, and, in that manner he could have consulted with and made preliminary arrangements with them for the funeral, pending his arrival, and by so doing would have relieved his mental anguish and suffering in whole or in part and failed so to do, then you would be justified in

finding that he was guilty of contributory negligence and cannot recover."

These offered instructions were refused and in this it is said the court erred. The defendant also moved for a directed verdict and for a new trial on this and other grounds. The trial court did instruct that before plaintiff could recover he must have shown that he was not guilty of contributory negligence and in another instruction contributory negligence was defined. No complaint is made, as we understand it, of the rule of law thus stated. But as to the particular matter of the failure of plaintiff to telephone during the day, covered by the offered instructions of the defendant, the court took the view that such fact was proper to be considered by the jury in mitigation and instructed on that subject as follows:

"If you find that by telephoning to his relatives at Ames, plaintiff could have consulted with them with respect to the making of preliminary arrangements for the funeral pending his arrival, and he failed so to do, it would be proper for you to consider such fact in mitigation of damages if you find in favor of the plaintiff."

The gist of plaintiff's claim is the failure of defendant to transmit and deliver the message to plaintiff, thereby causing his delay in reaching his mother and the mental anguish occasioned thereby. Plaintiff had nothing to do with transmitting or delivering the message. Nor did his failure to telephone his relatives have anything to do with that matter or with his delay in reaching his mother. Had plaintiff's failure to telephone caused delay in delivering the message or his own delay in reaching Ames, it would be a different matter.

The most that can be said is that had he telephoned it might have relieved his anxiety and thus reduced his damages. But even as to this, it should be borne in mind that he had been informed at 8:00 o'clock that morning that the funeral

arrangements would be delayed until plaintiff's arrival. The necessity for further telephoning, in regard to this matter at least, is not apparent. It would be very unsatisfactory to attempt to make funeral arrangements by telephone.

It is doubtless true that in cases of this kind, as in other cases of negligence, plaintiff may be precluded from recovering damages for mental anguish by reason of his own contributory negligence. 37 Cyc. 1791. Illustrations are there given and may consist in failure to send a message requesting the postponement of a funeral, or in failing to take an earlier train which the party might have taken, or in stopping off at an intermediate point. Cases are there cited upon which defendant relies. The question of contributory negligence which defeats a recovery entirely is a different matter from the duty of an injured person to use reasonable efforts to reduce damages. Appellant cites 2 Joyce on Electric Law, Sec. 972, to this effect:

"The duty rests upon all persons for whose losses others may be liable to respond, to take all reasonable measures to diminish the damages that may occur. This principle applies to all who may claim indemnity from others for losses either upon express contracts or for torts. So in cases where a person has been injured by the failure to deliver a telegraph message, or by an error in transmission thereof, and he stands in a position to suffer further loss in addition to that already incurred, he should exercise reasonable efforts to make the loss as light as possible, and there can be no recovery of damages for any loss which might have been averted by the exercise of such efforts."

To the same effect, Hale on Damages, page 64, *et seq.*, Sutherland on Damages, Sec. 88. In the last citation the rule is stated thus:

"The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordi-

nary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a practical duty under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable it is of great importance."

Under this rule it is only the damages which might be avoided by the exercise of ordinary care in this respect which cannot be recovered, rather than the whole of the damages which may be sustained. In other words, it is available to the defendant as mitigating the damages sustained by plaintiff rather than as a complete defense.

As before stated, plaintiff's failure to telephone had nothing to do with the delay in delivering the message or with plaintiff's delay in reaching Ames. The instructions at this point were as favorable to defendant as it could ask, and there was no error.

2. Under division two of appellant's argument in regard to elements of damage, it is contended that there is no evidence that the plaintiff suffered any damage as a result of being unable to reach Ames and meet his other relatives who were present as early as he otherwise would; and second, that such mental anguish would not be the natural and proximate result of the alleged negligent act complained of. The trial court in the instructions did not treat the question of damages on account of grief and anguish because of plaintiff's failure to meet his relatives as soon as he otherwise would, as a separate element of damages as distinguished from grief and anguish produced by plaintiff's failure to participate in the funeral arrangements as early as he otherwise would. The failure to deliver the message caused the delay in plaintiff's arrival at Ames and this delay includes, or may

2. APPEAL AND
ERROR: instructions: presumption that jury obeyed.

include, both these elements if they are the natural and proximate result of the negligence of the defendant.

In reference to this matter the court in instruction three informed the jury among other things that the burden of proof was on plaintiff to show:

1st. That there was unreasonable delay in delivering to him the said message;

2nd. That had the message been delivered to him within a reasonable time and with reasonable diligence, he would have reached the town of Ames and where his mother was earlier than it was possible for him to do because of the delay in the delivery of the said message;

3rd. That by reason of such unreasonable delay, he was not able to participate in the preliminary arrangements for his mother's burial, nor could he meet his relatives as early as he otherwise would have met them;

4th. That he himself was free from negligence which proximately contributed to produce the delay which rendered him unable to participate in the preliminary arrangements for his mother's burial and prevented him from being able to meet his relatives as early as he otherwise would have met them;

5th. That plaintiff, by reason of such unreasonable delay, was caused to suffer grief, mental anguish and pain;

6th. That within sixty days from and after the time of the said delay, he presented in writing to said defendant his claim for damages;

7th. That the said unreasonable delay was the proximate cause of the suffering by plaintiff of the said grief, mental anguish and pain;

8th. That he has been damaged, and the amount thereof.

If the plaintiff has proved each of the foregoing propositions by preponderance of the evidence, he should recover in this action.

And in instruction seven, the jury was told: "If you

find from a preponderance of the evidence that the defendant after 4 o'clock A. M. of the 29th day of February, 1912, acting as a reasonably prudent man would have acted under like conditions, should have delivered the message to plaintiff sooner than it did in fact deliver it, then defendant was negligent, and if such negligence was the proximate cause of delaying the plaintiff in reaching the city of Ames, and such delay prevented him from participating in the preliminary arrangements for his mother's burial as early as he otherwise would have done and from meeting his relatives as early as he would otherwise have met them, and that such facts were to him a source of grief, pain and anguish, and he himself was free from contributory negligence, then you should find in plaintiff's favor, provided that you find that he served notice of his claim for damages in the manner as alleged in his petition."

In an instruction on the measure of damages, the court said, "You, however, must be governed by the facts shown by the evidence in the case." Defendant requested an instruction as follows: "There is no evidence that the plaintiff suffered or sustained mental pain or anguish because he was delayed in reaching Ames and in meeting his other relatives who were present as early as he otherwise would, and you will not consider this claim for damages in determining the amount, if any, you shall award the plaintiff as damages in this case." This was refused.

Cases are cited by appellant holding that the burden was upon the plaintiff to prove not only the unreasonable delay on the part of the defendant in the delivery of the message but his measure of damage also. Plaintiff concedes this to be the rule. Plaintiff urges that even though appellant's contention be true, that there is no evidence that plaintiff suffered any damage as a result of being unable to reach Ames and meet his other relatives as early as he otherwise would, still, under the instructions given, the jury could have awarded the amount of the verdict for grief and anguish pro-

duced by plaintiff's failure to participate in the funeral arrangements as soon as he otherwise would, and allowed nothing for grief and anguish because of plaintiff's failure to meet his relatives; that it cannot be assumed that the jury has allowed damages for such grief and pain of which there is no evidence, inasmuch as the jury was told to base the verdict upon the facts shown by the evidence. We are inclined to this view. The question is whether plaintiff suffered because of the delay occasioned by the neglect of defendant, which, as stated, may include either one or both of these elements. It seems to us that instruction number seven is favorable to defendant. The court might well have said that if such delay prevented plaintiff from participating in the preliminary arrangements for his mother's burial as early as he otherwise would have done, or from meeting his relatives, etc., and that he was thereby caused grief, etc., he would be entitled to recover. Appellant does not seriously contend, as we understand the argument, that if defendant's neglect was the cause of delaying plaintiff in reaching Ames, and such delay prevented him from participating in the preliminary arrangements for his mother's burial as early as he otherwise would, that plaintiff would not be entitled to recover for grief and anguish occasioned thereby. True, plaintiff was told by telephone in the morning that the funeral arrangements would be delayed until his arrival, but they were not all delayed until that time. When he did arrive he then found that what had been done was satisfactory. But his anxiety was occasioned by his own delay in not being able to be present and participate as early as he otherwise would. Until his arrival he would not and could not know that they were satisfactory. We think there was evidence on this point. It is true plaintiff did not testify that he suffered so much for one or the other of these two matters and, of course, could not be allowed to do so. Nor did he testify in so many words that he suffered because he was

3. TELEGRAPH
AND TELE-
PHONE: death
message: de-
layed delivery:
mental an-
guish: evi-
dence: suffi-
ciency.

unable to meet his relatives. But he did testify that his sisters and one brother, blood relatives, were at Ames before he arrived, so that they were there. It is known of all men that one of the objects in being present on such an occasion is to meet one's relatives who are present. Plaintiff testified that because of his being delayed during the day and waiting at Clarion and Eagle Grove, he was very much depressed, worried, and annoyed, and that such condition of mind continued all day long and for some time afterwards. He did not in fact meet his relatives as early as he otherwise would by about nine hours, as to one sister at least.

It does not definitely appear when some of the others arrived. Some of the others arrived before plaintiff and one afterward. If plaintiff had arrived nine hours before, he could not, of course, have met those not then present, but this would not defeat plaintiff entirely as to this item, for some of his relatives were present all the time and would have been there upon plaintiff's arrival if he had not been delayed. This was a matter for the jury to take into consideration in fixing damages. Plaintiff admits his grief because of the death of his mother, but the evidence was such that the jury could have found therefrom that his grief and distress over his mother's death was intensified because of the delay in his reaching Ames to participate in the funeral arrangements and failure to sooner meet his relatives. There is other evidence as to this last item, but as we understand the argument, no question is made as to that at this point.

3. It is said by appellant that the court in its instructions made no distinction between blood relatives and relatives by affinity, and that the instructions permitted the jury to award damages to plaintiff for his inability to sooner meet his two brothers-in-law. The recovery was not for failure to meet anyone but for mental anguish because of the delay. As stated, the evidence did show that plaintiff failed to meet two sisters and a brother as early as he otherwise would. Brothers and

4. TRIAL: instructions: correct but not explicit: waiver.

sisters are "relatives" within the meaning of the instruction, and the mere fact that there were brothers-in-law, and that brothers-in-law might also be said to be "relatives" within the meaning of the instruction, does not argue that the instruction was erroneous. The instruction is correct so far as it goes, and there was evidence in the case to which the same was properly applicable, and if the defendant desired such a definition of the term "relatives" to be given to the jury as to enable the jury to eliminate from their consideration the brothers-in-law, it was the defendant's duty to ask such an instruction.

This court, on a similar question in the case of *Williams v. Park Association*, 128 Iowa 32, at 36, said: "It is argued that an instruction which told the jury that defendant would be liable for the negligence of its officers is erroneous, because it did not refer to the acts of its agents, servants, and employees, as well as its officers. The instruction being unquestionably right as far as it went, and plaintiff having failed to call the court's attention to the further proposition now suggested, there is no ground to allege error." See also the case of *State v. Hazen*, 39 Iowa 648, 650; *Murphy v. Hiltibridge*, 132 Iowa 114; *Osborne, etc. v. Ringland*, 122 Iowa 329, 334; *Hill v. City of Glenwood*, 124 Iowa 479, 483.

4. But counsel for appellant say that, admitting for the purpose of argument that plaintiff suffered mental pain and anguish because of the delay in meeting his relatives as early as he otherwise would have done, such mental anguish was not the proximate result of the negligence of defendant. The thought briefly stated is that such damages were not within the contemplation of the parties and that the defendant company had no notice from the language of the message or otherwise that such damages would be likely to result to plaintiff from its negligent delay in delivery.

5. TELEGRAPHS
AND TELE-
PHONES: death
message: de-
layed delivery:
proximate re-
sults.

The rule contended for by appellant is the holding in some jurisdictions, but it has not been followed by this court.

Many of the cases cited by appellant have been referred to in some of our cases and this court declined to follow them. Appellant quotes from 37 Cyc. 1781, as follows:

“The rule that plaintiff can recover only such special damages as may be said to have been within the contemplation of the parties applies to damages for mental anguish as well as for actual pecuniary loss, so that there can be no recovery on this ground unless the telegraph company had notice from the language of the message or otherwise, that by reason of its negligence or default such damages would be likely to result; and this rule applies not only to the existence of any mental anguish, but also to the particular elements or grounds for such suffering in the particular case.”

The latter part of the same paragraph from which the above is taken reads: “If, however, the company has notice, either from the language of the message or otherwise, of facts from which the resulting mental anguish might reasonably have been anticipated, it will be liable therefor; and ordinarily the fact that the message shows that it relates to a matter of sickness or death is sufficient to charge the company with notice that someone is likely to suffer mental anguish from its non-delivery or delay, although it may not be sufficient to charge the company with notice that mental anguish will result to the particular person appearing as plaintiff.” The message in question does not, it may be, give notice that plaintiff as a particular person would probably suffer mental anguish from failure to meet his relatives. But it was in effect a death message. From it the company was advised that the person referred to in the message was near to death, and was sufficient to charge the company with notice that “someone is likely to suffer mental anguish from its non-delivery or delay, although it may not be sufficient to charge the company with notice that mental anguish will result to the particular person appearing as plaintiff.” 37 Cyc. 1782. It seems to us the company ought to assume that

plaintiff had some close interest in the matter or a telegram would not be sent to him, and that on such occasions relatives are likely to be present. As before stated, everyone knows and the telegraph company ought to know that one of the reasons for a person's desiring to be present on such an occasion is to meet relatives who may be present, and if there are such relatives present, delay in meeting them will naturally occasion mental anguish to the person delayed.

At any rate, we regard this point urged by appellant as settled against its contention. It is unnecessary to again review the cases or give the reasons by which the conclusion was reached. The rule for Iowa was stated thus in *Foreman v. Telegraph Co.*, 141 Iowa 32, 36: "The relationship of the parties need not appear upon the face of the message, nor is it essential that defendant should know of the special relation existing between the parties interested. That some damage would likely be expected to follow from failure to deliver defendant well knew; and it is not essential that it be advised of the exact damage to be anticipated. . . . The rule above announced seems to be sound in principle, although it is not in accord with that adopted in Alabama, South Carolina, and Texas. See *W. U. Company v. Ayers*, 131 Ala. 391; *Butler v. Telegraph Co.*, 77 S. C. 148; *W. U. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482." See also *Cowan v. Telegraph Co.*, 122 Iowa 379, 386; *Maley v. Telegraph Co.*, 151 Iowa 228. See also *Western Union v. Moxley*, 98 S. W. 112, 113, where the Supreme Court of Arkansas says: "Cases are brought to our attention holding that, even though the message gives notice on its face that it concerned sickness or death of another and contains a summons to the addressee, still there can be no recovery for mental anguish by one not related by blood unless the company was notified of the relationship which would give rise to the mental anguish. This is the doctrine of the Texas courts. *W. U. T. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896. That court has also held that an uncle could not recover for mental anguish caused by failure to promptly

deliver a telegram containing information of the illness of his niece and summoning him to attend, because there was no notice to the company that the relationship was such as might cause mental suffering on account of delay in delivering the message. *W. U. Tel. Co. v. Wilson*, (Tex. Sup.) 75 S. W. 482. The doctrine announced by those cases does not commend itself to our approval. The rule in *Hadley v. Baxendale* cannot be extended further, in this class of cases, than to hold that, before the company can be made to respond in damages for mental anguish inflicted by negligent delay in transmission or delivery of a message, it must have notice of the facts from which it may reasonably be inferred that such damages may result from delay. Where the message upon its face gives notice of facts, as of physical injury, illness, or death, from which the company may fairly infer that mental anguish will result to the sender or addressee from delay in its transmission or delivery, then the company will be liable for negligent delay. Special notice that the relationship between the parties is such that delay will cause mental anguish is unnecessary. *Cashion v. Telegraph Co.* (N. C.) 32 S. E. 746. In *Lyne v. Telegraph Co.* (N. C.) 31 S. E. 350, it was held that where a telegram relates to sickness or death it is not necessary to disclose to the company the relation of the parties, as there is a common sense suggestion that it is important, and that mental suffering to someone will result from delay. The fact that a message is sent relating to death or illness is sufficient to reasonably indicate that the addressee is interested by ties of affection in the person about whom the message relates."

The question as to what is the proximate cause is ordinarily a question of fact for the jury. *Wheeler v. Ft. Dodge*, 131 Iowa 566, 580. We are of opinion that the court did not err at this point.

5. It is said the amount of damages awarded is excessive. In *Mentzer v. Telegraph Co.*, 93 Iowa 752, and *Cowan v. Tele-*

graph Co., 122 Iowa 379, the jury in each case returned a

6. DAMAGES:
death message:
delayed delivery:
excessive
verdict: when
disturbed.

verdict for a smaller amount than the verdict in this case and it is said by appellant that the facts were as aggravated as here. But the fact that the jury did so is not a precedent

for what the court ought to do. It is a question for the jury. The fact that the jury in this case allowed a larger amount than we would does not necessarily require us to fix the amount. Such a rule would put the court in the place of the jury. We may interfere if the award is clearly excessive, but the fact that the jury allowed more than we would does not necessarily indicate that the jury acted through passion or prejudice. There is, of course, no fixed standard. One jury might award a larger sum than another where the facts were no more aggravated. The damages are not based at so much per hour as suggested by appellant. Plaintiff was not prevented from being present at his mother's funeral, but he was delayed about nine hours waiting along the way and at railway stations with his mother lying dead and he delayed in meeting his relatives, and not permitted to participate in the funeral arrangements. Some men are so constituted that they are able to control their feelings better than others and it is for the jury to say how much in this case plaintiff should recover. The circumstances were such as to produce mental suffering. We would not be justified in interfering.—*Affirmed.*

LADD, C. J., EVANS and WEAVER, JJ., concur.

EMMA FROHS, Appellant, v. CITY OF DUBUQUE, Appellee.

EVIDENCE: Exclusion of—Non-Prejudicial Error. The exclusion of

- 1 an answer to a question seeking to show whether the curve of a wagon track, if extended, would or would not have passed over a pile of dirt was not prejudicial when the witness fully described and illustrated the conditions.

MUNICIPAL CORPORATION: Defect in Street—Notice of—Jury

- 2 **Question.** Knowledge of an excavation and obstruction in a much frequented street may be found from the fact that the city engineer, under authority, authorized the excavation and, by ordinance, the duty to superintend the work rested on the superintendent of streets, the work having proceeded for two days before the accident.

NEGLIGENCE: Precautions—Duty Fulfilled—Non-Necessity to Do

- 3 **More.** When that which is done is all that ordinary prudence requires in order to warn travelers of obstructions in streets, it is not negligence to omit other precautions, even though required by ordinance, when the doing of the thing omitted would afford no additional protection.

PRINCIPLE APPLIED: An excavation for sewer 10 ft. long, 20 in. wide, and 17 in. deep, was made as a private improvement on day of accident, on west side of a much frequented street. It extended southeast from curb to within two feet of the west rail of street car track. Dirt and rock, piled on north side of ditch, made an embankment 3 ft. high near west end and 2 ft. high near middle and slanting down to a point near the car track. White lantern was hung 3½ ft. from ground near east end of ditch, and 5 ft. west on top of embankment was placed a red lantern. No showing that lanterns could have been placed in more effective position. Red lantern somewhat smoky at time of accident, less than two hours after being placed. There were no other lights in the block, a distance of 600 feet. No barriers were placed around the ditch by the private contractor, *though required of him by ordinance*. Night very dark. Deceased drove south directly toward red lantern. Fifteen feet from embankment team turned to left, wheel struck bank, also the white lantern, and deceased was thrown off and killed.

Held, the warnings given fully discharged the city's duty and

as barriers would have afforded no added protection, it was not negligence to omit them.

Appeal from Dubuque District Court.—HON. J. W. KINTZINGER, Judge.

SATURDAY, DECEMBER 19, 1914.

REHEARING DENIED TUESDAY, MARCH 16, 1915.

ACTION for damages resulted in a directed verdict for the defendant from which plaintiff appeals.—*Affirmed.*

Kenline & Roedell, for appellant.

M. H. Czizek and M. D. Cooney, for appellee.

LADD, C. J.—The plaintiff is administratrix of the estate of Christ J. Frohs, who lost his life on October 29, 1912, being thrown from a wagon while driving along Couler Street, between 28th and 27th streets in the city of Dubuque. Several days previous, a sewer ditch had been excavated from a house on the west side of the street to the sidewalk about five feet deep and later this was extended to the curbstone and on the 29th, work was begun in excavating from the curbstone to within two feet and four inches of the west track of the street car line. The street was macadamized so that in excavating the ditch stones were removed, leaving the edges of the ditch somewhat irregular, varying in width from 16 to 24 inches, and from 14 to 20 inches deep. From the curbstone, the ditch extended somewhat south of east for a distance of nine feet and ten inches. The earth and rocks taken out were piled on the north side so that the base of the embankment was 3 feet 8 inches to 4 feet wide and varied in height from 1½ inches at the end near the car track to 2 feet in the center and about 3 feet at the curb. At the end of the ditch, near the car track, a plank was laid across the ditch about a foot above the surface and a 2x4 scantling leaned against it with one end in the ground, and at the other was

hung a large lantern with white light ten inches in the clear from the scantling and about $3\frac{1}{2}$ feet above the surface. About five feet west of this was a lantern with red globe sitting on top of the embankment. These lanterns had been cleaned and lighted at ten minutes after five o'clock P. M. There were no barriers other than the embankment and no electric lights between 28th and 27th streets, a distance of 600 feet. There was a drug store at the corner of 27th and Couler streets with a glass front, which was lighted at the time. From there to the next street south were no street lights. The deceased was driving a wagon for the Iowa Oil Company, having on it three barrels and several cans or tanks, and at six o'clock in the evening, he had met Purcell, driving a wagon for the Standard Oil Company, at the Giesel Springs saloon, where he took "a couple beers" and left at 25 minutes to seven o'clock, Purcell following. This was about one and one-half miles from the city limits, which were five or six blocks from the place of the accident. His team was spirited and was traveling rapidly along the right side of the street as they approached the ditch from the north. When about fifteen feet from it, his horses turned toward the car track and as the wagon wheel or wheels struck the embankment, deceased fell from his seat in front on to the singletree and, after being carried some distance, fell off and was run over. One wagon wheel struck the white lantern hanging on the 2x4. Both were still lighted, though the red globe may have been somewhat smoky. The night was very dark. The city ordinance provided that:

"No person, partnership or corporation shall make or cause to be made any excavation in any unpaved street or alley without written permit from the City Engineer. All excavations and fillings are to be done under the direction of and to the satisfaction of the Street Commissioner.

"Whenever any permit shall be issued the Recorder shall give written notice of the same to the Street Commissioner who shall have supervision of the work of excavation, and

shall see that the same is done in all respects in accordance with the permit granted."

I. The only eyewitness was John Becker, a draftsman, who was standing at the gate leading to the house from which the ditch was dug. After testifying that the team when about 15 feet from the ditch turned to the east and that he had observed the wagon tracks later, he was asked in substance, "Whether or not the angle of the circle that the wagon was describing at and before it reached the accumulation of rocks and dirt was such that in the event there had been nothing to deflect the course of the wagon whether it would have crossed over the ditch or otherwise." An objection as incompetent, immaterial and irrelevant and calling for a conclusion was sustained, the court remarking that the witness might describe the wagon tracks and where the turn was, and in ruling on a similar question, said he might describe the tracks by using a board, and we understand from the record that he did illustrate on a black-board. The ruling was not prejudicial. Where the line of a small circle will extend is not a matter of expert evidence but within the knowledge of anyone of ordinary intelligence. Whether in the nature of a fact conclusion need not now be considered. The witness described the curve in its relation to the embankment and ditch, and therefrom the jury was able to say whether, but for some obstruction, the deceased likely would have avoided the ditch. Conditions were such as could be easily described and conclusions drawn therefrom by the jury. The ruling was without prejudice.

II. Whether the city was charged with notice was an issue appropriate for the jury. The permit to excavate and lay the sewer pipe was obtained from the city recorder October 18, 1912, and the day previous, permission had been obtained for the sewer connection from the city engineer. By city ordinance it was the duty of the recorder upon issuing the permit to give notice to the street commissioner, who is given

1. EVIDENCE: ex-
clusion of:
non-prejudicial
error.

2. MUNICIPAL
CORPORATION:
defect in
street: notice
of: jury ques-
tion.

supervision of the work of excavation. The evidence discloses that Couler is one of the well-traveled thoroughfares of the city and that residences are close to each other on each side of the street, and that at least as early as Friday before the Tuesday of the accident, the excavation was begun, and was extended from the sidewalk to the curbing on Monday, and the remainder of the work done on Tuesday. In view of the duty imposed on the recorder and street commissioner and the use made of the street, and excavation being done during the two days prior, we are of opinion that evidence was sufficient to carry the issue as to notice to the jury. *City Council of Augusta v. Cone*, 91 Ga. 714, 17 S. E. 1005; *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912; *Oklahoma City v. Welsh*, 3 Okla. 288, 41 Pac. 598; 5 Thomp. Neg., Sec. 5993. As it was made the duty of the superintendent of the streets to superintend the work and the city engineer by authority authorized the excavation, it is not perceived upon what theory it can be said that the city was not aware of the condition of the street. In any event, there was enough at least to carry the issue to the jury.

III. Might the jury have found defendant negligent? The city was by statute required to keep its streets in repair and free from nuisances, and though excavations therein for certain purposes, as in laying sewer pipe, are necessary and do not necessarily constitute a nuisance, it is incumbent on the city at all times

3. NEGLIGENCE:
precautions:
duty fulfilled:
non-necessity
to do more.

to exercise ordinary care in guarding travelers against injury by barricading these or by lights warning them against the danger thereof. This duty to take reasonable precautions as the nature of the case requires to safeguard travelers upon the street against injury from such excavations, is none the less imperative where made by others as licensees or independent contractors or others by permission or under the direction of the city. *Pace v. Webster City*, 138 Iowa 107; 5 Thompson on Negligence, Secs. 6018, 6020, 6036. The duty cannot be delegated nor the responsibility evaded. *Pow-*

ell v. Waterloo, 144 Iowa 689, 691; *Bennett v. Mt. Vernon*, 124 Iowa 537. So that whether private or public improvements are being made in the streets and under whatsoever arrangement, the obligation of the city to maintain the streets in a reasonably safe condition and to exercise reasonable diligence to guard and protect travelers thereon from receiving injury is continuous. A traveler is not bound to apprehend danger nor to be vigilant in discovering obstructions but may walk or drive in daytime or nighttime, relying upon the assumption that the municipality has performed its duty in maintaining the streets in a reasonably safe condition for public travel and has not by its neglect exposed him to danger. *Pettengill v. City of Yonkers*, 116 N. Y. 558, 22 N. E. 1095; *Drake v. Seattle*, 70 Pac. (Wash.) 231; *McAllister v. City of Albany*, 23 Pac. (Ore.) 845; *Grider v. Jefferson Realty Co.*, 116 S. W. (Ky.) 691. All exacted from him is the exercise of ordinary care in the use of the streets.

The issue then is not whether the private contractor putting in the sewer was negligent in not obeying the ordinance with reference to the barrier, but whether what was done was all that was essential in the discharge of the city's duty to warn or guard travelers against the danger arising from the obstruction. If placing the lanterns as they were in the evening in question was sufficient and all that ordinary prudence required, there was no negligence on the part of the city; if such ordinary prudence exacted more lights or in addition thereto a barrier, then the city was negligent.

The evidence was such as to leave no doubt but that the white light, hanging above the embankment and 3½ feet above the surface, could have been seen by an approaching traveler, and that deceased either saw it or could have seen it had he looked. Its location near the center of the street was a warning to take necessary precaution to avoid some danger at and in the vicinity of the lantern. So, too, the red light was at the top of the bank half way to the curb line, and though the globe may have been somewhat smoky, was

shown to be visible for some distance. The darkness would render those lights the more effective. It is not perceivable how a barrier would have afforded additional protection. This would have been scarcely more visible than the embankments. If, then, deceased could only have seen it because of the lights and therefore would have been warned by the lights quite as well as though there were also barriers, these were not required. The circumstance that the red light was toward the west indicated that the obstruction extended in that direction, and that if there were a way open at all this must have been on the east side of the street. It is suggested that the lanterns, in view of the way they were placed, might have been found inadequate to give the required warning. This is a mere guess, for there was no evidence to that effect or as to how else they should have been placed. Even if the ditch was at an angle of 45 degrees with the curb line, and the white light a little farther south than the red light, and the latter somewhat north of the end of the ditch at the car line, the distance was not so far but that the excavation and earth could have been seen by the light before reaching it. Moreover, the evidence disclosed that deceased was driving about half way between the curb and the car track and therefore directly toward the red light, with the white light not over two feet farther on, and with them so close together he could not well have been misled. The angle of the ditch, then, did not render the light less effectual as a warning to a traveler coming from the north. No ground appears for saying the lanterns did not light the entire length of the excavation and afford adequate warning of the danger incident to the ditch and embankment. This being so, the jury was rightly directed to return a verdict for defendant. Having reached this conclusion, it is unnecessary to inquire whether deceased was at fault. The judgment is—*Affirmed*.

WEAVER, EVANS and PRESTON, JJ., concur.

IOWA PIPE & TILE COMPANY, Appellant, v. PARKS & GERBER
et al., Defendants, Appellees.

MECHANIC'S LIEN: Claim of Subcontractors Against Public Cor-

1 porations—Drainage Districts. A material man furnishing material to the principal contractor engaged in constructing a drainage improvement under Chapter 2-A, Title X, Supp. Code, 1913, is not entitled to a so-called mechanic's lien under Sec. 3102 of the Code, against the county whose board of supervisors enter into a contract on behalf of the drainage district for the construction of such improvement. (But now see Sec. 1989-a57, Supp. Code, 1913.)

MECHANIC'S LIEN: Equitable Claim to Fund—Failure to Show

2 Amount Due. A subcontractor, seeking to establish an equitable claim to a fund in the hands of a county for the payment of a drainage improvement, must at least show the amount due the principal contractor from the county, especially when the contractor has assigned his contract to another party.

Appeal from Hamilton District Court.—HON. R. M. WRIGHT,
Judge.

TUESDAY, MARCH 16, 1915.

ACTION by plaintiff as a subcontractor to recover against a public corporation under the provisions of Code Sec. 3102 the value of materials furnished for a public improvement. A general equitable demurrer to the petition was sustained. Plaintiff appeals.—*Affirmed.*

A. N. Boeye, for appellant.

D. C. Chase, for appellees, Holland Drainage District No. 102, Hamilton County, Iowa, Board of Supervisors of Hamilton County, Iowa, A. J. Peterson, County Auditor of Hamilton County, Iowa.

Thompson & Meltzer, for appellee, W. H. Minard.

EVANS, J.—The defendants are: Hamilton County, Iowa; its county auditor; its board of supervisors; a purported drainage district within the county; Parks & Gerber and W. H. Minard. It appears from the petition that Parks & Gerber entered into a contract to construct a certain drainage improvement for a drainage district in said county. The material allegations of the petition are as follows:

1. MECHANIC'S
LIEN: claim of
subcontractors
against public
corporations:
drainage dis-
tricts.

“Par. 2. That on January 11th, 1911, the defendant Hamilton County, and the defendants The Board of Supervisors of said county for and in behalf of the drainage district aforesaid, entered into a written contract, dated February 23rd, 1911, with the defendants Parks & Gerber for the construction in said Holland Drainage District No. 102 of a certain drain composed of tile and pipe, at the agreed price of \$2,382, payable upon estimates of work done under said contract as furnished from time to time by the engineer in charge of said work.

“Par. 3. That on February 9th, 1911, this plaintiff entered into a verbal contract with the defendants Parks & Gerber to furnish said firm tile and pipe to be used in the construction of the drain in the district aforesaid, under the contract referred to, and on March 23rd, 1911, and from time to time thereafter until September 14th, 1911, and including the latter date, the plaintiff furnished tile and pipe under said contract with said Parks & Gerber, which was used by them in the construction of said drain as aforesaid, of the value of \$1,234.97, no part of which has been paid except the sum of \$106.50, leaving still due plaintiff the sum of \$1,128.47, with interest at 6 per cent per annum from September 14th, 1911, an itemized statement of said pipe and tile being hereto attached marked Exhibit ‘A’ and made a part hereof.

“Par. 4. That on September 19th, 1911, plaintiff filed with the defendant A. J. Peterson, the County Auditor of the

defendant Hamilton County, Iowa, its itemized sworn statement of its demand and claim for said tile and pipe so furnished as aforesaid.

"Par. 5. That on September 12th, 1911, said contract was assigned to the defendant W. H. Minard.

"Par. 6. That the drain provided for by the contract aforesaid between said Holland Drainage District No. 102 and the defendants Parks & Gerber has been completed and said contract performed, and only \$832.46 was paid to said Parks & Gerber prior to the filing of plaintiff's claim, said payment being made August 26th, 1911."

A copy of the contract and of the claim filed with the county auditor are also set out. An amendment to the petition contained the following allegations:

"Par. 2. That the improvement provided for by the contract aforesaid has been completed to the satisfaction of the engineer in charge, and has been accepted by the defendant Board of Supervisors."

It will be seen from the foregoing that the cause of action is predicated wholly upon Sec. 3102, above referred to, which is as follows:

"Every mechanic, laborer, or other person who, as a subcontractor, shall perform labor upon or furnish materials for the construction of any public building, bridge or other improvement not belonging to the state, shall have a claim against the public corporation constructing such building, bridge or improvement for the value of such services and material, not in excess of the contract price to be paid for such building, bridge or improvement, nor shall such corporation be required to pay any such claim before or in any different manner from that provided in the principal contract. Such claim shall be made by filing with the public officer through whom the payment is to be made an itemized sworn

statement of the demand, within thirty days after the performance of the last labor or the furnishing of the last of the material, and such claims shall have priority in the order in which they are filed."

In support of the ruling on demurrer, the appellees challenge the sufficiency of the statement of account filed by the plaintiff as the basis of its claim and the sufficiency of the filing of the same as not having been filed with the proper officer. In our judgment, these objections are without merit. In view of our conclusion on the larger merits of the case, we need not discuss these preliminary objections.

The larger question is whether the section above quoted has any application to the case before us. It may be conceded that a slight change in the terminology of the statute could have rendered it applicable. It may be noted also that a statute similar in its effect was enacted by the Thirty-fifth General Assembly, being Chapter 155 and now appearing as 1989-a57, Code Supplement, 1913.

The rights of the parties herein must be determined, however, under the statute herein quoted. The remedy therein provided creates for a subcontractor a qualified "claim against the public corporation constructing such . . . improvement for the value of such services and materials." This is the precise form and extent of the remedy provided. We need take no account at this point of the limitations set upon such remedy. The only public corporation which is a party defendant in this case is Hamilton County. Though paragraph two of the petition avers that Hamilton County entered into the contract with the principal contractor, it appears from the written contract itself, which is set out as an exhibit, that Hamilton County was not a party to the contract at all, nor did the contract so purport. The contract was entered into on behalf of the drainage district and its beneficiaries by the chairman of the board of supervisors and the county auditor, in obedience to the provisions of the statute in such cases. It is not claimed in argument that the county was a party

to the contract or that it had any interest in the improvement as a corporation. A judgment was rendered for the plaintiff against the principal contractor. There was no other defendant personally liable under the contract and no other person or corporation liable under the statute except the "public corporation constructing such improvement." On the face of the statute, therefore, it must be said that it does not reach plaintiff's case.

The plaintiff urges, however, that we have heretofore applied this statute to such a claim in the case of *Humboldt County v. Ward Bros.*, 163 Iowa 510. Examination of that case will disclose that this question was not passed on therein. The case was such that the question could have been raised by the appellant therein, but it was not. The only question raised by the appellant in that case was that the claims were filed after thirty days and were, therefore, filed too late. Neither the county nor the public officers representing the interests of the drainage district were resisting such claims in that case. Only the principal contractor and his surety resisted the same. We held that "independent of the statute" the claimants were entitled to the funds as against the contractor. The value of their labor and material had entered into the previous estimates upon which the contractor had drawn 80% of the amount of his contract. The claimants asked that they be adjudged to have a claim against the remaining 20%. We held them equitably entitled to such relief, regardless of the statute, and that the rights of the surety were no greater at this point than those of the contractor whose performance it insured.

In the case before us, the facts pleaded in the petition would not warrant equitable relief independent of the statute. The allegation that only \$832 had been paid the principal contractor when the plaintiff filed his claim is not

2. MECHANIC'S
LIEN: equitable
claim to fund:
failure to show
amount due.
- equivalent to an allegation that any further sum had been earned by or was due to the contractor. The contract provided for payment in installments as the work progressed and according

to the value of the work done as estimated by the engineer. This allegation might be true and it might still be true that nothing more was due the contractor and that he never earned anything more. Surely if plaintiff's suit had been instituted at that time and before the performance of the enterprise, it would not be claimed that the right of the plaintiff was higher than that of the public officials to use the funds in their hands to finish the work. The petition avers that on September 12, 1911, the contract was assigned to Minard. The contract being executory and unperformed, such assignment amounted to a subletting, and under the contract could only be done with the consent of the public officials. In such case, Minard would not be a mere assignee of moneys earned and accrued. He stands in a different relation and with higher claims of equity than such an assignee. We cannot aid the averments of the petition by presumption or intendment for the purpose of reversing the ruling of the trial court. On the contrary, the pleading must be construed against the pleader. The allegation of the amendment that the "improvement provided for by the contract has been completed to the satisfaction of the engineer in charge and has been accepted by the defendant Board of Supervisors" is not equivalent to an allegation that Parks & Gerber ever earned by performance any more than the \$832 which was paid to them. Of course, if the case were governed by the provisions of the statute, this discussion might be quite irrelevant. It pertains only to the query whether the petition shows the plaintiff entitled to equitable relief independent of the statute. For the reasons indicated, we think the question must be answered in the negative. The demurrer was, therefore, properly sustained and the order is—*Affirmed*.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

ROBERT M. NEUBRAND, Appellant, v. W. H. KRAFT et al.,
Appellees.

AUTOMOBILES: Bailment—Liability of Bailor—Negligence of Bailee. The bailor of an automobile for hire, who furnishes no driver, is not, ordinarily, responsible to third persons for the negligence of the bailee.

PRINCIPLE APPLIED: One who was engaged in the business of letting automobiles for hire let a car without a driver to one who was accustomed to the use of automobiles but not of the make in question. The owner, in the presence of the bailee, backed the car out of the garage and gave him some instructions as to its use. The bailee was also given other instructions as to the operation of the car at a garage other than that of the owner. The car was in perfect condition. The bailee negligently injured a third person. *Held*, the bailor was not liable. The court says: "In the absence of evident unfitness of a customer applying for a vehicle, we see no reason why the owner should be held to make an investigation into his qualifications as a driver."

Appeal from Monona District Court.—HON. J. F. OLIVER,
Judge.

TUESDAY, MARCH 16, 1915.

THE opinion states the case.—*Affirmed*.

J. A. Pritchard, for appellant.

M. W. Newby, for appellees.

WEAVER, J.—The petition alleges that the defendants Leitzen are owners of a garage in the town of Mapleton, where they keep automobiles for sale and hire and hold themselves out to the public as being engaged in that business; that in pursuit of such business and occupation they let for hire to the defendant Kraft a Ford automobile, knowing at the time

that Kraft would himself run and operate the car and was intending to drive it to the town of Ute, where there was to be a large gathering of people attending a carnival of sports. It further alleges that the Leitzens well knew that an automobile driven by an unskilled driver or by one not familiar with a car of that pattern was a dangerous machine to be driven among crowds; that said defendants were informed that Kraft had no knowledge of the mechanism of a Ford car and in fact had never driven one, yet, knowing these facts and the danger attending his use of said car, they carelessly and negligently let the car to said Kraft for the purposes above mentioned. It is further alleged that plaintiff was a spectator with others at the carnival in Ute and, in the exercise of reasonable care on his part, he was struck and severely injured by said Ford car being then and there operated by said Kraft without due skill and care as he was being permitted to do through the negligence of the defendants Leitzen. For the injury thus sustained, he demands judgment for the recovery of damages from all the defendants.

The defendants admit the keeping of a garage by the Leitzens, that they let a Ford automobile to Kraft and knew that he intended to use it in taking his family to the carnival at Ute. They admit also that plaintiff was injured by a wire which was accidentally struck by said car while being operated by Kraft, but they each and all deny any negligence on their part with respect to the use of said car or to the injury suffered by plaintiff.

The evidence, so far as material to the appeal, tends to show that Kraft was accustomed to operate automobiles but had no previous experience with a Ford car. At the time he hired this car, one of the defendants got into the car with Kraft and backed the car out of the garage and gave him some instruction or direction as to its use. Kraft then drove the car to the vicinity of another garage or shop, where he was further instructed as to the manner of operating a Ford. He then drove to Ute and, while there operating it in a manner

which a jury might properly find to have been negligent, caused the injury to plaintiff.

Plaintiff having made this showing and rested his case, the court sustained the motion of the defendants Leitzen for a directed verdict in their favor. The plaintiff appeals.

I. In argument for appellant, counsel contends that one who lets an automobile for hire is responsible for the proper skill and care of the person to whom he entrusts it. In sup-

port of this position, we are cited to certain
1. AUTOMOBILES : English cases where the owner of a cab is held
 bailment : liable for injuries resulting from the negli-
 liability of gence of the driver. But such cases are par-
 bailor : negli- allel neither in fact nor in principle with the one now before
 gence of bailee. us. The proprietor of a cab or hack stand lets his carriages
supplied with drivers of his own selection and in his own em-
ployment. While to a certain extent the driver under such
circumstances becomes the servant of the hirer, he does not
cease to be the servant and representative of the cab owner,
so far as the immediate care and management of the carriage
and its motive power are concerned ; and if, by his careless or
reckless driving, a collision occurs upon the street and a third
person is thereby injured without fault on his own part, the
owner is very reasonably and properly held to respond in
damages. But the owner of a livery stable or garage, making
a business of letting teams or carriages or motor cars to cus-
tomers who propose and expect to do their own driving, has
never been held to any such rule of responsibility by any
court so far as the precedents have been called to our atten-
tion, and we think there is no general rule or principle neces-
sitating such conclusion. Cases may be imagined, perhaps,
where an owner recklessly lets his spirited team or his auto-
mobile to an immature child or to a person who is intoxicated
or otherwise manifestly incompetent to manage or control it,
with the natural result of a collision upon the public street and
consequent injury to others. It may well be that under such
circumstances the owner would be held liable in damages, not

because the hirer is his servant or because as owner he is required to vouch to the public for the competency of all persons to whom he may let his teams or his cars for hire, but because he knew the incompetency of this particular driver and the imminent peril to which he thereby exposed others who were in the lawful use of the streets, and as a person of ordinary prudence should have refrained from so doing. Nothing of this manifest want of prudence is shown in this case now under consideration. Kraft, the hirer, is shown to have been a man accustomed to the use of automobiles. True, he had not before used a Ford car, but he had operated several others, and with the explanation and instruction which it is conceded he received concerning the manner of handling this car, we are disposed to hold that defendants cannot be charged with any failure of duty to the plaintiff or to the public in permitting him to drive it. To say otherwise and hold with plaintiff's contention would be to extend the law of liability for negligence to an unprecedented degree and to place a ruinous burden upon the business of letting vehicles for hire.

Our attention is also called to the case of *Tuller v. Talbot*, 23 Ill. 357, where the driver of a stage coach placed the reins in the hands of a passenger by whose negligence another passenger in the coach was injured, and the owner was held to respond in damages. This and other similar cases cited are to be classed with the English precedents above referred to and are not here in point. The owner of the stage line was a common carrier of passengers. The passenger who was injured had no control over the driver. The owner was in duty bound to protect the passenger against the negligence of the servant, and the act of the servant in passing the reins to a third person was in legal effect the act of the owner, who thereby became responsible for the negligence of the substituted driver. The defendants in this case were not carriers. They let their vehicles for hire, assuming no responsibility for negligence or recklessness of the hirer, save, perhaps, under exceptional circumstances such as we have already

adverted to. In the absence of evident unfitness of a customer applying for a vehicle, we see no reason why the owner should be held to make an investigation into his qualifications as a driver.

II. It is next said that an automobile is of such character that, while perhaps not *per se* a dangerous instrument, it may easily become such, and the owner is therefore bound to the exercise of greater care than would be required were there less danger in its operation. There is more or less danger in the use of vehicles of any kind. The motorcycle, the bicycle, the stage coach, the ordinary carriage drawn by horses, all have their possibilities of peril and there is room for difference of opinion concerning the various degrees of danger to be apprehended therefrom. The great body of those who use the various instrumentalities of travel are persons of ordinary prudence, while the incompetent or negligent is the exception. The fact that here and there a driver carelessly or recklessly converts his vehicle into an engine of injury or destruction to others is not a sufficient reason for requiring the owner of such vehicles for hire to test and ascertain the competency and skill of every customer before entrusting him with the custody of a car.

Nor is there any likeness, as counsel seems to think, between this case and that of the livery stable keeper who wilfully lets for hire an animal he knows to be vicious or dangerous. If the car in this case was defective in some respect which rendered it incapable of control or made it a source of special danger, and defendants had allowed it to go out in that condition and thereby plaintiff had been injured, a very different question would be presented. But so far as shown, the car was in perfect condition, and the sole cause of plaintiff's injury was the carelessness or forgetfulness of Kraft, who, in an emergency, threw a lever the wrong way, thereby causing a sudden acceleration of speed instead of checking it, as he intended. Had he been driving a hired team and in some way had heedlessly got the reins crossed in his hands,

thereby running over and injuring the plaintiff, counsel would hardly advise his client that the owner of the outfit was liable in damages for the hirer's negligence. The fact that the vehicle in this case happens to have been an auto car instead of a horse and buggy or a coach and four calls for the application of no different rule.

The testimony in the case discloses no cause of action against the appellees and the judgment below is therefore—*Affirmed.*

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

J. J. OBE, Appellant, v. BOARD OF SUPERVISORS et al.,
Appellees.

DRAINS: Assessing Benefits—Method Pursued—Statute. Invalidation

- 1 of an assessment of benefits cannot be predicated on the fact that the appraisers first classified the land as "dry," "low," "wet" and "swampy" in order to more intelligently mark the lands upon a scale of 100 as provided by Sec. 1989-a12, Sup. Code, 1913.

DRAINS: Assessment of Benefits—Branches to Main Drain—Valid-

- 2 ity. Invalidation of an assessment of benefits cannot be predicated on the fact that one assessment covered both the main drain and branches.

DRAINS: Assessment of Benefits—Prior Existing System of Drain-

- 3 age. The fact that the landowner has already constructed a system of drainage prior to the construction of the public drain should be given due consideration in assessing benefits for the public drain.

DRAINS: Assessment of Benefits—Excessiveness. Approximate ac-

- 4 curacy is all that can be hoped for in an assessment of benefits. Evidence reviewed and held to show that assessment in instant case was not excessive.

PRINCIPLE APPLIED: In the instant case the landowner claimed that his already existing drain was lower than the public drain and therefore he was not benefited in the least by the
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public drain. Evidence reveals the fact that he was in error on both contentions.

Appeal from Hamilton District Court.—HON. R. M. WRIGHT,
Judge.

TUESDAY, MARCH 16, 1915.

THIS was an appeal by the plaintiff to the district court from an assessment of benefits by the board of supervisors in a drainage proceeding. Upon a trial had in the district court the assessment was confirmed. From such order the plaintiff has appealed.

Wesley Martin, for appellant.

D. C. Chase and *J. M. Blake*, for appellees.

EVANS, J.—The district in question comprises about 2,200 acres of farm land. It comprises lands in sections 2, 3, and 4 in one township and in sections 32, 33, and 34 of the adjoining township on the north. The plaintiff is the owner of four 40-acre tracts within the district. Two of these are in section 34 and two in section 4. Assessment was made against him for benefit to 117 acres. The principal assessment was made against the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 4 and was for \$511. This assessment furnishes the principal point of attack as being excessive. The drainage improvement was a covered tile drain. Its actual cost was about \$19,000. The plaintiff's land was near the head of the water course but was servient to about 300 acres of dominant land. The outlet to the improvement was about a mile and a half from his lands. The course of the water was from north to south. The tile drain was of course constructed up-stream. It entered the plaintiff's land at the lower line with a 20-inch tile and proceeded through his 40-acre tract with an 18-inch tile, making about

90 rods of the main line upon the plaintiff's land. For most of this distance it extended parallel with the plaintiff's west line and at a distance of about 20 rods from such line. Appellant's argument presents the following errors relied on for reversal:

"1. There was error in holding that the lands had been properly classified, the evidence showing without dispute that the classification was contrary to the express requirements of the statute.

"2. There was error in permitting the assessments of the two districts to be grouped in one assessment and this was jurisdictional.

"3. The decree is not supported by the evidence. The assessment appealed from should have been set aside or greatly reduced, and the decree is therefore erroneous and without foundation in the evidence.

"4. The comparison of plaintiff's assessment with the assessments of other lands in the district shows that the assessment of plaintiff's land is much too high."

I. The first step taken by the appraisers in order to classify the lands under the statute was to measure or estimate the acreage of "dry," "low," "wet," "swampy" lands within the district. It is urged that this is a violation of Sec. 1989-a12 of the Code Supplement which provides that the lands or benefits shall be marked upon a scale of 100. This was the scale actually adopted by the appraisers. The act complained of was only the first step in that direction. The method complained of is identical with that involved in *Pabeldt v. Hamilton County*, 144 Iowa 476. It was there approved as being consistent with the requirements of the statute.

II. It is said that the district as established did in fact include two districts. The basis for this claim is that the

1. DRAINS: as-
sessing bene-
fits: method
pursued:
statute.

main drain culminated in two branches. The plaintiff was situated upon one of these branches, the branching point being about 100 rods below his lower line. The necessity or advantage of a branch or branches to a main drain is naturally incidental to any drainage district of considerable extent. It is not repugnant to the drainage statute but is often if not usually necessary to its practical application.

III. As already indicated, the principal complaint is directed against the amount of the assessment against the 40-acre tract above described.

It appears that this tract of land was originally flat, wet land, for the most part. The plaintiff, however, had expended large sums in constructing a tile drainage system upon it and had achieved a degree of success in that direction. Near plaintiff's south line is a railway running nearly east and west. Running from north to south across plaintiff's tract was a draw or water course which passed south under the railroad bridge. In this draw the plaintiff had laid a 16-inch tile drain which had its outlet at his south line into an open ditch which he had scraped out and which passed under the railway bridge. The public drain herein involved was laid a short distance to the west of the plaintiff's drain and practically parallel with it except that the public drain was laid in a straight line and the plaintiff's drain followed the sinuosities of the water course. In this way the public drain cut the plaintiff's main drain at one or two places, and the branches thereto at other places. Plaintiff's claim for a reduction is based upon two considerations: (1) that the fact that he had already constructed a tile drainage system of his own should be taken into consideration in fixing his assessment and (2) that the public drain as actually constructed gave him no benefit whatever.

It is undoubtedly true that the plaintiff was entitled to have consideration taken of the fact that he already had a

2. DRAINS: as-
assessment of
benefits:
branches to
main drain:
validity.

3. DRAINS: as-
assessment of
benefits: prior
existing sys-
tem of drain-
age.

drainage system, and the extent and efficiency of such system. But it is also quite clear from this record that such fact was considered by the appraisers and by the district court. The efficiency of the system as compared with the public drain will be considered in a later paragraph. Several 40-acre tracts in the district were assessed in sums ranging from \$985 to \$1,255. Others were assessed at sums ranging from \$600 to \$900. If the plaintiff's tract had been in its original condition it might well have been classed among the high percentages. It was flat ground and was in the path of the floods. Only the fact that its drainage had been partly accomplished accounts for the favorable difference between its assessment and some of the higher assessments.

IV. Was the assessment excessive for want of benefit? Several witnesses testified for the plaintiff to the effect that his tract received no benefit whatever from the new drain.

4. DRAINS: assessment of benefits: excessiveness. This testimony was predicated upon the contention that the grade line of plaintiff's own drain was one or two feet lower than the grade line of the public drain. At this point there is sharp contradiction in the testimony of the different witnesses. It is the key to the whole controversy of fact and we have directed our especial attention thereto in the reading of the evidence. The contention of the witnesses for the defendants is that the grade line of the public drain was from one to two feet lower than that of the plaintiff. The plaintiff's witnesses conceded that the public drain was lower than plaintiff's drain at plaintiff's outlet. Witness Anderson testified as follows:

"I know of the outlet on from the bridge, or at the bridge. The county tile seemed to be two feet lower than Obe's tile, and they were both running, and Obe's tile had washed out a hole down to the other tile."

This is an important concession and tends to support the contention of the defense. The efficiency of plaintiff's line was measured by the depth of his outlet. According to the

witnesses of the defendant, the bottom of the public drain was three or four feet deeper than plaintiff's outlet. It appears from the evidence of the plaintiff and some other witnesses that the public drain cut his line wherever it intersected it and practically cut off the flow of the water. This is consistent with the claim of the defendants that the public drain was lower than that of plaintiff. It is inconsistent with the other contention and no explanation of the inconsistency is offered. If the grade line of the public drain were as shallow as contended for by the plaintiff's witnesses it would be practically without value to any part of the district. And yet no land owner in the district complains of it except the plaintiff. Some of plaintiff's witnesses frankly conceded that the plaintiff received a benefit from the public drain in that it took care of the water from the dominant lands and protected him to that extent. It is practically undisputed that a much larger volume of water was running through the public drain than was running from plaintiff's outlet into such drain. It is also undisputed that at one or two places at least the plaintiff did connect his tile with the public drain successfully. The two witnesses who were in the best position to know of the relative elevation of the grade lines were Swift and Iliff. Swift was the contractor who dug the ditch and laid the tile and Iliff was the engineer in charge. The plaintiff called Swift as a witness and the defendants called Iliff. Their testimony at this point is without material difference. From both of them it appears that the public drain was much deeper than that of the plaintiff. When it is considered that the plaintiff had only a surface outlet aided by the natural fall of the ground and some scraping out of an open ditch, the contention of the defendants seems the more probable.

We think, therefore, that the trial court was justified in holding with the defendants at this point. We are likewise convinced that the plaintiff's witnesses must have been in error at this point and that the grade line of the public drain is lower than that of the plaintiff's drain.

If we are correct in this conclusion, there is little room for doubt that, notwithstanding the drainage previously accomplished by the plaintiff, he will yet receive very material benefit by the utilization of the public drain. Upon this hypothesis, the evidence would not warrant any disturbance of the assessment. The main contention has centered upon this tract. The assessments against the other tracts are comparatively light and we will not deal with them in detail. Approximation is the best that can be done in this class of cases. It cannot be said upon this record that approximate justice has not been attained. The order entered below is therefore—*Affirmed*.

DEEMER, C. J., LADD and PRESTON, JJ., concur.

HUGH PARKHILL, Appellee, v. BEKIN'S VAN & STORAGE COMPANY, Appellant.

LIMITATION OF ACTIONS: "Commencement" of Action—What

- 1 **Constitutes.** The actual service of an original notice of suit is the "commencement" of an action, and tolls the statute of limitation, even though the petition subsequently filed states the accrual of the action materially different than as stated in said notice, said petition stating a date such that, had no notice been served, the action would have been barred prior to the filing of the petition. (Secs. 3450, 3514, Code.)

PRINCIPLE APPLIED: In action for personal injury (barred in two years) an original notice was served November 24, 1913, which stated the date of injury as June, 1912, and referred defendant to the petition to be filed for farther particulars. A petition was duly filed December 26, 1913, which stated the date of the injury as December 15, 1911. Defendant voluntarily appeared January 5, 1914, answered on January 12, 1914, and amended on February 18, 1914, by pleading statute of limitation, claiming, in effect, that defendant was stating a different cause of action in the petition than as stated in the notice. Plaintiff made no claim that he had two causes of action. *Held*, (a) that it was unnecessary to state in the notice the date of the injury, and (b) having been stated, it need not be proven,—that the action was not barred.

DAMAGES: Personal Injuries—Hospital Expenses—Reasonable

- 2 Value. One suing for personal injuries may properly show that he paid the amount charged for hospital services, evidence of the reasonable value thereof being later supplied.

EVIDENCE: Expert Opinion—Physician's Personal Examination—

- 3 Hypothetical Question. As to the cause which might have brought about the condition of an injured person, a medical expert may give an opinion based on (a) his personal examination of the person and (b) a hypothetical statement of the facts.

MASTER AND SERVANT: Personal Injury—Knowledge of Defect—

- 4 Instruction. Under an issue whether defendant was negligent in directing plaintiff to move a piano with a truck which defendant knew was broken, defective and unsafe, it is declared that "if, in the exercise of reasonable care, defendant *should* have known of the defective condition of the truck, and without knowing or without using reasonable care to ascertain the condition of the truck, defendant directed plaintiff to use and move the piano with it, then defendant was negligent." Instruction in instant case held to be the equivalent of this statement of the law.

MASTER AND SERVANT: Personal Injury—Servant's Right to Pre-

- 5 sume Master's Performance of Duty. On the question whether the servant had exercised reasonable care, the jury may be told that the servant had the right to presume, in the absence of knowledge to the contrary, that the master had performed his duty to exercise reasonable care in furnishing the implements with which the servant was required to perform his work.

PRINCIPLE APPLIED: The servant's duty was to assist in the putting away and handling of goods in a storage house, and was supplied with trucks for that purpose. A piano fell upon him because the truck was defective. The manager directed him to use a certain truck. The servant asked the manager if he thought it safe. The manager "got down" and examined it where it was welded, and told the servant it was good and solid and to "go ahead" and use it. Servant did not know it was imprudent to use it. The truck broke where it had been welded, and the servant had theretofore seen this weld, but had seen no crack. He had nothing to do with selecting the truck or keeping it in repair. *Held*, above principle had proper application to the case. *Held*, servant was not guilty of contributory negligence *per se*.

DAMAGES: Recovery of Expenses "Paid"—Inaccuracy Cured by

- 6 Evidence. It is inaccurate, of course, to instruct that one may

recover his expenses "incurred," but such inaccuracy is non-prejudicial when the undisputed evidence shows such expenses to be reasonable in amount.

APPEAL AND ERROR: Failure to Instruct on Issues—Waiver.

- 7 Error cannot be predicated on the failure to specifically instruct on the issue of assumption of risk when (a) defendant requested no such instruction, and (b), in its objections to the instructions as given, did not object to such failure. (Sec. 3705-a, Sup. Code, 1913.) Especially is this true in view of Sec. 4999-a3, Sup. Code, 1913, abolishing assumption of risk in cases like instant one.

MASTER AND SERVANT: Safe Tools—Repair—Ocular Inspection

- 8 of Defect—Negligence. Merely looking at or superficially inspecting the external conditions of an appliance or tool furnished the servant for the performance of work may not satisfy the full measure of the master's duty to furnish reasonably safe appliances, when the servant's safety depends upon the soundness of the material, the sufficiency of a repair, or the firmness of the separate parts of the appliance.

PRINCIPLE APPLIED: (See No. 5.)

TRIAL: Argument Aside Record—Rebuke by Court—Caution to Jury

- 9 —Nonreversible Error. Arguments aside the record are, of course, improper, but the action of the court in promptly rebuking such argument, with direct caution to the jury to disregard the same, has large curative power. Court's refusal to grant new trial on this ground upheld.

PRINCIPLE APPLIED: Counsel referred to the fact that the defendant was a corporation, which was well able to pay the damages, and that the plaintiff, after his injury, was refused employment by defendant, as to which latter statement it was claimed there was no evidence. Rebuke by the court followed with caution to disregard the statements. *Held*, not reversible error.

Appeal from Woodbury District Court.—HON. DAVID MOULD,
Judge.

TUESDAY, MARCH 16, 1915.

ACTION at law to recover damages for personal injuries received by plaintiff while in defendant's employ, due to the fact that defendant furnished plaintiff a defective truck with

which to work. Defendant denied the negligence charged, pleaded assumption of risk and contributory negligence, and also the statute of limitations. Upon the issues joined, the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed*.

Sargent, Strong & Struble, for appellant.

Geo. W. Kephart, P. H. Konzen, and F. E. Gill, for appellee.

DEEMER, C. J.—The first question which we shall determine arises upon defendant's answer pleading the statute of limitations. An original notice was placed in the hands of one Montgomery, who served the same upon the defendant on September 24, 1913. In this notice, it was stated that a petition would be on file on or before December 26th of the same year, claiming damages by reason of an injury received by plaintiff during the month of June, 1912, due to the defendant's negligence. The notice also stated: "For further particulars, see petition which will be placed on file. . . ." The defendant was notified to appear at the next January term of court, commencing on the 5th day of January of the year 1914. A petition was filed on December 26, 1913, and therein plaintiff charged that his injuries were received on December 15, 1911. On January 5, 1914, defendant appeared; and on the 12th day of the same year, it filed an answer. On the 18th day of February of the same year, it filed an amendment to its answer, pleading the statute of limitations. Such actions as this are barred by statute when not commenced within two years from the time the cause thereof accrued. Code Sec. 3447, Par. 3. The petition, which must govern, states that the cause of action accrued on December 15, 1911, so that it must have been commenced on or before December 15th of the year 1913. The petition was not filed, and defendant did not appear until after the statute had run; but

1. LIMITATION
OF ACTIONS:
"commence-
ment" of ac-
tion: what
constitutes.

the original notice was served on November 24th of that year, and this was in time. Ordinarily, in this state, an action is commenced by the service of an original notice. Code Sec. 3514.

Defendant insists, however, that the notice served in this case was of another cause of action, to wit, one occurring in June of the year, 1912, and that this was not the commencement of the present action. The proposition is plausible, but not tenable. True, the original notice stated that the injury occurred in June of the year 1912, but this was not a material part of the notice; and in the instant case, the defendant's attention was not only called to the petition itself, which was to be forthcoming, but it responded thereto, and entered a voluntary appearance to the action. If the notice was not of this action, then it has no place in the record; and as the date of the accident need not be stated in the notice, or if stated, need not be proved, a mistake therein which does not in any way mislead is to be disregarded. Plaintiff has at no time claimed that he had two causes of action; and the only one he presented was the one stated in his petition. Manifestly, he was mistaken in fixing the date in his original notice, but this was corrected in the petition, if it needed correction, and no possible prejudice resulted to the defendant. There is no merit in defendant's plea, and the court properly disregarded it.

I. Plaintiff was in defendant's employ as a common laborer, whose duties were to check goods as they came into and went out of defendant's storage house, to assist in putting them away for storage and to take them from one floor to another by the use of an elevator. He received his orders from S. P. Bekin, defendant's manager, and was supplied with trucks for the purpose of moving goods. He had been at work some four years before the accident occurred, but testified that never before had he moved pianos until the time the accident occurred. He was directed, on the day in question, to move a player piano, which was encased in a box, from the floor where it then was to an upper one, and he asked the

manager what truck to use, and was directed by him to get the long one, for the reason that it could be more easily balanced on that one. We here quote from the record as follows:

"I said, 'Do you think it is safe to carry that extra heavy piano?' He got on his knee and looked at it, and said: 'Yes.' I said: 'Do you see the weld on it?' and he said, 'Yes.' I said, 'Do you think it is safe?' and he said, 'Yes.' I thought it was all right and I used it. This truck was in the storage house when I went there. At that time it was broken and out of commission. He had on wooden cross pieces, and this bit welded. The bit is the front iron. The bit sticks up in front of the handle, and it has two wheels below. This bit stands on two irons, one piece of iron under it, and this piece was broke. There were five trucks in use there all together. This was the largest one of the five. Two of those trucks were about three feet long; you couldn't use them even on a big box. There were two a little longer and one was extra long, probably six inches longer than the other two. That was the one I used on this occasion. The next largest truck had a broken leg and couldn't be used. It was my custom, under the order of the foreman there, to move heavy articles of this kind around the storage room on trucks.

"Q. Now, Mr. Bekin directed you to use this truck; and you say that he got down on his knee and examined it? A. Yes, sir. Q. And what did he say? A. He said the truck was all right; to go ahead and take it up. Q. And he ordered you to go ahead? A. Yes, sir. After Mr. Bekin examined the truck, he said: 'That is all right; go ahead and take it up there.' I had no means of knowing how much weight this truck would carry. I never moved an article as heavy as this piano on this truck. We put the bit under one end of the piano and bore down on the handle; that brings the piano up four or five inches off of the floor. One man gets straddle of the truck and holds it, while the other gets it further underneath until we get the piano balanced. I had the handles of

the truck. After I got the piano on the truck, I set three or four inches back of the handles. The purpose in moving it that far back is to get it to balance on the bit. After we got the piano on, I started to move it; just started to swing around; I had my shoulder on the end, and my head on the back side of it and pushing, and as I tried to swing it, the bit broke and it came onto my shoulder, and I felt something give in my rectum. In the meantime I told Johnson to 'let down quick, I am hurt,' and Johnson grabbed it and got it up so that I could raise my hands and let loose, and then I sat down on some barrels and I didn't know anything for some time after that; I became unconscious. I was pushing this piano ahead of me. I had to turn it to get it out of the alleyway; I was turning to the left. I was stooped over with my hands near the floor and my legs about six or ten inches apart and my hands were within ten inches of the floor. There was not a great deal of weight on the handles because the piano was balanced. I had my head and shoulders against the corner of the piano because you do your pushing with your shoulders and you have to have your head on one side to see where you are going. Mr. Johnson was at the other end of the piano. He had one hand against it to steady it. The floor there was pretty holey. The bit of the truck broke. The piano tipped toward the back and that is the corner at which I had my head and shoulders. The weight of the piano came against me with a sudden chug. When the weight of the piano came against me, I felt something snap in my rectum. I examined the truck afterwards to see where it was broken. It was broken where this weld was, that Mr. Bekin had examined. I should judge that the weld was $2\frac{1}{2}$ or 3 inches long, and this bit was welded about half way through. The other iron came together, but was not welded, just about half had been stuck; about half had not been welded together. There was a crack left there at that weld. A little piece of it happened to stick. I could see where the new iron stuck, and the other was rusted and black. When Mr. Bekin examined

the truck he said, 'There is a weld there, but it is good and solid.' After the piano fell over on me I raised my hand and told Mr. Johnson that I was hurt, and to let it down quick. He grabbed it and held it and I raised my hands and got it off. I sat down on some soda barrels then and became unconscious; I do not know how long I remained unconscious.

"Frequently my helper and myself handled pianos and moved them from one place to the other in the storage house as they came in, and have moved them and placed them on the elevator and up on the other floors. That was true during all the time while I was there in moving pianos and things of heavy character that we could not roll by hand. We had not moved a piano player in a box such as this before on a truck. This piano player is just the same as a piano with an attachment inside that operates the piano, but it is much heavier; it has the same appearance.

"I had noticed something the matter with this truck; that is, I had noticed the weld in the bit. This bit is a sort of an iron turned up. It is a kind of an iron out from the end of the beam. When I picked this out I saw where it had been welded. I did not see any crack. I always asked him about heavy weights. I have always asked about heavy weights, whether it would hold or not, at different times. I could not see whether anything was the matter with the weld or not; it was not possible to discover whether anything was the matter with it where I stood, but where he stood he might. I was standing up and he went down on his knees. I did not call his attention to the particular thing I wanted him to look at. I said, 'Do you think it is strong enough to take it up on?' "

Another witness testified as follows:

"Q. Did you hear Mr. Bekin order Mr. Parkhill that morning to use this particular truck? A. He asked Mr. Parkhill what truck we would use, it is an awful heavy piano, and what truck we would use. This truck here had the legs

broken off, and we could not use it, and center piece there that was broken off, and the legs were broken off on this here truck, this truck was disabled at that time. Q. Tell what Mr. Bekin ordered Mr. Parkhill to do. A. Parkhill asked which truck we should put it on, which he thought was strong enough. He said, 'Take that truck over there.' That was the other truck that we did use. He says, 'Do you think that is strong enough to take and hold it?' Q. Who said that? A. Mr. Parkhill asked Bekin if he thought it was strong enough, and he stooped down and examined it. Q. Who did? A. Mr. Bekin examined the truck that morning. Q. How did he examine it? A. He got on his knees, he got on one knee and looked at it like this here (indicating). I was standing right there and Parkhill was like that. And this welding here, I called his attention to it and asked if he thought that was strong enough to hold that, and he said, 'Yes, take it and go ahead, it is all right.' The bit on the truck was welded on the left side. I called Mr. Bekin's attention to that at the time he was looking at it. I said, 'Do you think it is welded strong enough, do you think that it is all right in there?' and he said, 'Yes, that is all right. You go ahead with it; that will be all right, that is all right.' I said, 'It don't look like it is welded enough,' and he said, 'You can see the lap.' But it didn't look like it was welded tight on this lap. On the other truck you could see where it has been fixed since. After it broke I could see where it had been welded. It was what was known as a lap weld. Q. State whether or not when you called Mr. Bekin's attention to that weld there that morning there was any indication of it being open? A. It was open. I called his attention to it. It was open. The weld on the outside was open, on the left side was open, but on the inside it was welded, on the inside it was welded about half an inch, and this here flaw opened up like this here. After the injury I examined the truck again. I found the truck where it was only welded not over probably half an inch to the outside, it was not welded on the outside at all. All that was

welded was probably a quarter of an inch, about half an inch on the outside of the piece."

The negligence charged in the petition was:

"That the defendant was careless and negligent in directing plaintiff to move said piano with a truck which it well knew was broken and defective and not safe for use in moving a heavy piano. That the defendant was careless and negligent in failing to furnish sufficient help to assist plaintiff in moving said piano."

The trial court withdrew from the jury the charge that defendant was negligent in not furnishing plaintiff sufficient assistance in moving the piano, but submitted the other charge to the jury, resulting in the verdict and judgment already stated. Many rulings are complained of, but they may be grouped under three or four principal heads, to wit: Errors in the admission and rejection of testimony, errors in the instructions, misconduct of plaintiff's counsel in argument, and insufficiency of the testimony to support the verdict.

II. Over defendant's objections, plaintiff was permitted to prove the amount paid by him to the hospital; it being the amount charged by the hospital, to wit, \$25 to \$30. While this was not the true measure of recovery, it was proper to show that he paid the bill. By another witness, plaintiff proved that this was the regular and reasonable charge at that hospital and there was no error. By another witness, who rendered the service, plaintiff was permitted to show that he paid him the sum of \$125.00 for medical services, and that this was a reasonable value of his services. There was no error here. The same observation may be made regarding the testimony of another medical witness.

Certain rulings made on the cross-examination of one of plaintiff's witnesses are complained of. We have examined them and find no error. The witness was permitted to answer all relevant and material questions propounded to him. Sev-

2. DAMAGES: per-
sonal injuries:
hospital ex-
penses: rea-
sonable value.

eral doctors were permitted to answer hypothetical questions propounded to them, and this is said to be error because the questions assumed facts not proved or admitted of record. These too have been examined in the light of the argument, and nothing was assumed in the interrogations which was not supported by some testimony or some legitimate inference therefrom, and there was no error here.

Medical experts who examined the plaintiff were permitted, upon a hypothetical statement of the facts and their personal examination of the plaintiff, to give their opinion

8. EVIDENCE: expert opinion: physician's personal examination: hypothetical question.

as to what might have caused his condition as they found him. In this there was no error. Of course, if the expert has made no physical examination, his opinion must be based wholly upon the facts assumed in the question; but

assuming his competency, if he has made a personal examination of his patient, he may from that examination, aided by a proper hypothetical question, give his opinion as to what might have produced the injury. *Vannest v. Murphy*, 135 Iowa 123, does not hold to the contrary. What is there said had reference to the opinion of a non-expert.

III. The trial court gave the following, among other instructions:

"If you find from the evidence introduced in this case that the truck was defective, and was not a reasonably safe instrument with which to move the piano; and you further

4. MASTER AND SERVANT: personal injury: knowledge of defect: instruction.

find that the defendant knew, or in the exercise of reasonable care and diligence should have known that said truck was defective and an unsafe instrument with which to move the

piano; and without knowing or without using reasonable care to ascertain the condition of said truck, the defendant's manager directed the plaintiff to move the piano with said truck, then you should find that the defendant was negligent in the particulars charged. But if you find that the defendant used reasonable care in furnishing the plaintiff with a truck; and

the truck was defective by reason of hidden blemish which the defendant could not have discovered, in the exercise of reasonable care, and if he did use reasonable care in ascertaining the condition of said truck, and had no knowledge that the same was defective, then you should find that the defendant was not negligent, and your verdict should be for the defendant. Or if you find from the evidence that the defendant did not direct the plaintiff to move said piano with a truck, but that plaintiff proceeded to use the truck in moving the piano without directions from the defendant, or anyone in its employ; then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

The italicised part of this instruction is complained of. It is not entirely clear; but taken in connection with the entire instruction, as it should be, it was not, as we think, erroneous. The thought of the trial court evidently was that if, in the exercise of reasonable care and diligence, defendant should have known of the defective condition of the truck, and it, without knowing or without using reasonable care to ascertain the condition of the truck, directed the plaintiff to use and move the piano with it, then defendant was guilty of negligence. So construed, there was not error. The counter part of the proposition is embodied in what follows, and a jury could not have been misled by the words chosen, in any event.

IV. The seventh instruction given by the trial court reads as follows:

"If you find that the defendant was negligent in directing the plaintiff to move the piano with a defective truck, you will next proceed to determine whether or not the plaintiff has shown by a preponderance of the evidence that he himself was free from negligence contributing to his injury, and you are instructed that plaintiff cannot recover unless he has shown to you by preponderance of the evidence that he himself was free from negligence contributing

5. MASTER AND
SERVANT: per-
sonal injury:
servant's right
to presume
master's per-
formance of
duty.

to his injury. It was the duty of the plaintiff in performing his work to give reasonable attention to the implements with which he was required to work in the discharge of his duty. He was not entitled to voluntarily expose himself to a danger of which he had knowledge, or might have known by the exercise of reasonable and ordinary care. And if he knew that the truck in question was defective, or should have known it was defective, in the exercise of reasonable care, and he did not exercise ordinary care for his own safety in using the truck, then he cannot recover. *But in determining the question as to whether in using the truck the plaintiff was in the exercise of reasonable care, you are instructed that he had a right to presume, in the absence of knowledge to the contrary, that the defendant had performed its duty and exercised reasonable care in furnishing the implement with which he was required to work.* In determining whether or not the plaintiff was in the exercise of reasonable care in using said truck, you may take into consideration the evidence as to the length of time the plaintiff was employed in the warehouse, the knowledge or means of knowledge he had of the condition of the truck; the direction, if any, he had from the defendant to use the truck, and all other facts shown by the evidence bearing on the question of his exercise of reasonable care, and therefrom determine whether or not the plaintiff, at the time of the injury complained of, was in the exercise of reasonable care."

The italicised part of this instruction is also complained of. In view of the facts as shown by the record, regarding defendant's duty to supply proper appliances and keep them in repair, the question made by plaintiff regarding the condition and safety of the truck given him, the examination made of the truck by the defendant's manager, his assurance to the plaintiff that the truck was all right, and his direction to the plaintiff to use it for the particular purpose then in view, there was no error in this part of the instruction criticised.

V. In the ninth instruction the court said, in part:

"If you find for the plaintiff you are instructed that he can only recover for such injuries, if any, as the evidence shows are the proximate result of the negligence complained of; he is entitled to recover for the expense for doctors' bills and hospital bills, if any, necessarily incurred by him as a result of said accident, not exceeding the amount claimed therefor in the petition."

This is said to be erroneous, in that it announces an incorrect rule as to the measure of damages. It is not exactly accurate, but in view of the undisputed testimony that these expenses were reasonable, there was no prejudicial error. *Flanagan v. R. R. Co.*, 83 Iowa 639; *Sachra v. Town*, 120 Iowa 562.

VI. Although defendant pleaded assumption of risk by plaintiff in using the truck in question, with knowledge of the hazard involved in its use, the trial court did not expressly cover that point in its instructions. The defendant asked no instruction with reference to this matter, and in its objections to the instructions as given, did not cover the proposition. For these reasons alone, appellant is not now entitled to complain. Moreover, the case seems to be ruled by Chapter 219, Acts of 33d G. A., which eliminates the doctrine of assumption of risk where the employer, because of his duty to an employee, furnishes appliances which are defective or out of repair. The case does not fall within any of the exceptions noted in this statute.

VII. Defendant stoutly contends that there is no testimony as to any negligence on its part and that the testimony shows plaintiff was guilty of contributory negligence as a matter of law, and that there should have been no recovery in any event. It was defendant's duty to use reasonable care in furnishing plaintiff with proper appliances with which to work, and to use reasonable care in keeping the same

6. DAMAGES: recovery of expenses "paid": inaccuracy cured by evidence.

7. APPEAL AND ERROR: failure to instruct on issues: waiver.

8. MASTER AND SERVANT: safe tools: repair: ocular inspection of defect: negligence.

in repair and condition for the use intended. Plaintiff had nothing to do with the selection or repair of the truck and was justified in relying upon what the manager told him regarding the truck and as to its being a proper and sufficient appliance with which to do the work required of him. Defendant's manager undertook to look the truck over, and after making a somewhat superficial examination, assured plaintiff that the truck was safe and a proper appliance, and directed him to use it. Plaintiff had the right to rely on this assurance and direction, unless he knew that the truck was unsafe, and that it was hazardous and imprudent for him to work with it. In such circumstances, plaintiff was not guilty of contributory negligence as a matter of law. Whether he was in fact guilty of such negligence was a question for the jury, and they found that the plaintiff was not guilty. We should not interfere with this finding. *Lamb v. Wagner*, 155 Iowa 400; *Klaflke v. Axle Co.*, 125 Iowa 224; *Bell v. Axle Co.*, 146 Iowa 337; *Kroeger v. Bridge Co.*, 138 Iowa 376.

On the question of defendant's negligence, it was a question for the jury to say whether or not defendant's manager, Bekin, used proper care in the repair, selection, and inspection of the truck before directing plaintiff to use it for the purposes intended. The trial court so instructed the jury, and we are not justified in interfering with its verdict. It is not a case where an employer has furnished proper tools and the employee has made a selection of his own, or one where the employee undertook himself to inspect the particular appliance, or a case of selection of a proper tool by the employee, but one where the master assumed all these responsibilities. The case is in some respects like *Luisi v. R. R. Co.*, 155 Iowa 458; *McGuire v. Mill Co.*, 137 Iowa 447; *Anderson v. R. R. Co.*, 109 Iowa 524, and is ruled in this respect by the doctrines there announced. The truck furnished in this case was not a simple appliance, as a hammer, a saw, or an ordinary hatchet, and defendant was required to use at least ordinary care in keeping it in repair, and in inspecting the same from time to

time. *Gould v. R. R. Co.*, 66 Iowa 590; *Lynn v. Glucose Co.*, 128 Iowa 501. Whether or not it used that care was a question for the jury. Mere visual or ocular inspection of external conditions may not satisfy the full measure of the master's obligation, where the servant's safety depends upon the soundness of the materials, the sufficiency or adequacy of a repair or firmness of the separate parts of the appliance. See 1 Labatt on Master and Servant, (Ed. of 1904) Sec. 161, and cases cited.

VIII. During the argument of the case to the jury, the following record was made:

"By Mr. Struble: Counsel for plaintiff, in his opening argument, has just stated to the jury: 'We must remember in this case, gentlemen, that we are not dealing with an individual, but with a corporation, which is a creature of the law.' To that line of argument, and statement that counsel has been making, the defendant objects as improper argument and tending to create prejudice, and not based on any testimony in the case, and made for the purpose, if possible, to create a prejudice in the minds of the jury.

9. TRIAL: argument aside record: rebuke by court: caution to jury: non-reversible error.

"By the Court: The court rules that a corporation has the same rights as an individual, and any remarks that would lead the jury to prejudice are improper and the jury is instructed not to consider them. The mere fact that the defendant is a corporation may be stated to the jury.

"By Mr. Konzen: I do not see why the jury would not have the right to draw that distinction.

"By the Court: If he tried to distinguish between a corporation and individual before the jury there is danger in it. A corporation has the same rights as an individual.

"By Mr. Konzen: The court holds I may refer to the corporation, but not to the prejudice of the defendant?

"By the Court: Yes, sir.

"By Mr. Struble: You may note an exception.

"By Mr. Konzen: Then after the operation he goes back and gets in shape to do anything. Faithful old servant he is, he thinks perhaps that they need him down there and he will report for duty. What does he find? He is turned out in the cold like a disabled horse you don't want any more into the highway.

"By Mr. Struble: Is there any testimony of that kind in this case?

"Mr. Konzen: I think so.

"By Mr. Struble: About going down and being turned away in the cold.

"By Mr. Konzen: They refused to employ him.

"By Mr. Struble: There is no testimony of that kind in the case.

"By Mr. Konzen: He said that he went down to ask for his job and did not get it. I don't want to get outside of the record."

Mr. Konzen, continuing his argument further, said:

"There is one consolation if you find for the plaintiff, then you assess the damages, and the burden will fall on shoulders that are well able to stand it.

"By Mr. Struble: We object to this argument as incompetent, immaterial, prejudicial and improper argument.

"By the Court: The objection is sustained and the jury instructed not to pay attention to it, and the attorney cautioned not to argue in that line any more."

Whilst counsel overstepped the bounds in some of these statements, the court immediately rebuked him and cautioned the jury not to consider the improper statements. They were not such as were likely to influence the jury and we are not prepared to say that the trial court abused its discretion in refusing to grant the motion for a new trial on this ground. *Swanson v. R. R. Co.*, 153 Iowa 78; *Wissler v. City*, 123 Iowa 11.

IX. The last and only other proposition we shall consider is the claim that the verdict is excessive. Plaintiff was about 52 years old at the time he claims to have received his injuries, and he was earning \$70.00 per month. Since that, he has not earned more than \$24.00 per month. Before the accident, he was sound in body; but since that, he has been under the constant care of physicians. He has had at least one operation. He complains of pain in the spine and his doctors say that he has a fistula of the rectum, internal hemorrhoids, and that this condition is permanent. Some of the doctors say that he has or had prolapsus of the rectum with hemorrhoids and a fistula, and all say that he is not likely to be cured. They further say that this condition might have been caused by the injury which he received. This testimony was contradicted by other experts for the defendant, who left in much doubt the question as to whether plaintiff's injuries are as severe as he claims, and as to whether or not his injuries could have resulted from the accident; but this conflict among the medical men made a case for the jury, and while, if the damages depended upon plaintiff's loss of time and impairment of earning capacity, we should have no hesitation in saying that they are excessive, yet as the question of his pain and suffering, past, present, and prospective, is involved, we are not justified in reducing the verdict, although we may entertain doubt as to whether the conditions now existing are due to the accident.

Finding no prejudicial error in the record, the judgment must be, and it is,—*Affirmed*.

LADD, EVANS and PRESTON, JJ., concur.

JAMES K. BAKER et al., Appellees, v. WILLIAM BAKER,
Appellant.

DEEDS: Undue Influence and Mental Incapacity—Combination of—

- 1 **Effect.** A combination of "mental incapacity" and "undue influence" may be sufficient to overturn the deed of a grantor, when, if either element stood alone in the record, the court could not unhesitatingly pronounce such result. The aged and enfeebled condition of the grantor, his retirement from active business and the dominating influence surrounding him may be a deciding factor in forcing the conclusion that it was not his mind that was acting but the minds of others.

PRINCIPLE APPLIED: Action by the heirs to set aside a deed by the father and mother to a son. The title was in the mother. The deed by the father only carried, if at all, his contingent dower. He was never intellectually strong, was 83 years old when the deed was executed, was feeble and childish and his eyesight was very poor, was very quiet and reserved, though he sometimes boasted of his physical prowess. He had long abandoned all business matters to his wife. The wife was a strong, vigorous, assertive, dominating character—the genuine "head" of the family. She had marked affection for the son, grantee in the deed, and their relations were very close. The affection of the father for this son was in much less degree. The father was really not consulted in the execution of the deed. The mother died first. *Held*, the deed should be set aside as to the father and that he be held to have died seized of his dower interest.

APPEAL AND ERROR: Trial de Novo—Influence of Judgment of

- 2 **Trial Court.** The judgment of the trial court is influential and persuasive, even though the trial on appeal is *de novo*.

DEEDS: Validity—Parent to Child—Consideration Inadequate—Prej-

- 3, 5 **udice Against Children—Effect.** (a) Prejudice against his or her children, (b) a special fondness for one child over another founded upon a rational conception of his or her relationship to them, (c) the leaving other children unprovided for, or (d) inadequacy of consideration, are not, of themselves, sufficient to overthrow the deed of the parent to a child.

LIMITATION OF ACTION: Deed Conveying Dower—Action to Set
4 Aside—When Action Accrued. An action to set aside a deed executed July 19, 1899, conveying contingent dower, on the ground of mental incapacity and undue influence, was not barred by statute of limitation, Sec. 3447, Par. 7, Sup. Code, 1913, (providing a period of ten years in which to recover real property), when commenced December 2, 1910, the spouse seized of title having died June 29, 1905.

Appeal from Audubon District Court.—HON. THOMAS
ARTHUR, Judge.

WEDNESDAY, MARCH 17, 1915.

ACTION by the heirs of Eliza and Robert Baker to set aside a conveyance made by them to William Baker, the defendant, on the ground that the same was procured by undue influence and that the grantors were wanting in mental capacity to make the deed. Both parties appealed.—*Affirmed* on both appeals.

Joe H. Ross and J. B. Rockafellow, for appellant.

J. M. Graham and Willard & Willard, for appellees.

GAYNOR, J.—The plaintiffs in this case, James K. Baker, John T. Baker and Josephine Oliver, and the defendant, William Baker, are the children of Eliza Baker and Robert Baker. The interveners, Anna Hotchkiss and Nellie Smith, are daughters of Eliza and Robert Baker. The other interveners are the children and heirs at law of Margaret Hoffman, a daughter. The interveners join in the prayer of plaintiffs' petition.

The action is brought to cancel and set aside a certain deed executed by Eliza and Robert Baker to the defendant, William Baker, and for a decree establishing ownership in said land in favor of the plaintiffs and interveners, as follows: One-seventh interest in each of the children of said Eliza and Robert Baker, and one-seventh interest in the heirs of Margaret Hoffman.

On the 19th day of July, 1899, Eliza Baker and Robert

Baker conveyed to the defendant, William Baker, the North-east Quarter of Section 18 and the West Half of the North-west Quarter and the Southeast Quarter of the Northwest Quarter, Section 17, Township 81 North, Range 34 West of the 5th P. M., containing about 280 acres. This deed was duly recorded on the day of its execution.

The plaintiffs and the interveners claim that this deed was obtained from Eliza and Robert Baker by fraud, duress and undue influence; that, at the time of the execution of the deed, the grantors were old, feeble, childish, and infirm, and subject to the will and influence of the defendant; that the defendant, by means of misrepresentations to the effect that the other children would not take care of them in their old age, and would not properly provide for them, and that, if they obtained any of the property, would squander it, and by means of threats to the effect that he would abandon and leave them if they would not execute the contract in question, induced them to execute it; that they were old, weak, and infirm, and did not fully know the import of the instrument they executed. It was further alleged that the decedents retained possession of the real estate until their death, and the defendant did not take possession until after their death.

The defendant, William Baker, answering, admits that Eliza Baker was, at one time, the owner of the real estate described in the petition. Admits that she died on the 12th day of May, 1905, and that Robert Baker, her husband, died on the 29th day of June, 1905. Defendant denies each and every other claim of plaintiffs and interveners.

Defendant, further answering, says that he purchased the real estate from said Eliza and Robert for a good and valuable consideration, and that, on the 19th day of July, 1899, they executed to him a warranty deed for the same, and the same was duly recorded on that day; that defendant immediately entered into the possession, and has ever since held open, notorious, adverse, hostile, and exclusive possession thereof for more than ten years. Defendant further pleads

the statute of limitations, and also prays that his title to the land be quieted in him.

Plaintiffs and interveners for reply admit that the defendant has been in the possession of all the real estate, but that he did not claim, to any of these heirs, to be the owner of the land prior to March, 1906. Did not claim that the land had been deeded to him, and that prior to that time they had no knowledge or information that he claimed to own the same.

It appears that the original notice in this action was served on the defendant on the 2d day of December, 1910, and the petition filed on the 3d day of December, 1910.

Upon the issues thus joined, the cause was tried to the court, and the following finding of facts made by the court:

That, at the time the deed in controversy was made, Eliza Baker, one of the grantors, was competent to make it; that Robert Baker was not; that Eliza Baker was the owner of the land at the time; that Robert Baker had only a dower interest therein; that the deed passed all the right, title and interest of Eliza Baker in the land to the defendant; that Robert Baker, being incompetent to join with her in the deed, and, therefore, incompetent to make a deed that would release his right of dower, remained vested with a dower interest in the land; that Eliza Baker died first; that, upon her death, Robert Baker became entitled to an undivided one-third of the land, as his distributive share as the husband of Eliza Baker; that the plaintiffs and interveners have no right or interest in the two-thirds of the premises in controversy, conveyed by Eliza Baker to him; that they have an interest, as the heirs of Robert Baker, to an undivided interest in the distributive share of Robert Baker which passed to him upon the death of Eliza Baker; that each of the plaintiffs and interveners and the defendant are entitled to a one-seventh of the one-third interest, or one twenty-first part of that which passed to Robert Baker upon the death of his wife; that the children of Mrs. Hoffman are entitled to a one-seventh interest

of the one-third, or one-seventh of one twenty-first part of the real estate, and, there being seven of them, are each entitled to a one one-hundredth forty-seventh part of Robert Baker's dower interest.

The defendant appeals from so much of the decree as finds that Robert Baker was incompetent to make the deed, and so much of the decree as gives to the interveners and plaintiffs an interest in an undivided one-third.

The plaintiffs appeal from the decree in so far as it finds that Eliza Baker was competent to make the deed, and that, under the deed, two-thirds of the land passed to the defendant.

The defendant, having appealed first, will be treated as appellant, and the plaintiffs as appellees. We will treat of defendant's appeal first. It involves the questions:

1st. Does the evidence show that Robert Baker was incompetent to make the deed at the time it was made, or was undue influence exercised over him in procuring it?

2d. Is plaintiffs' claim barred by the statute of limitations?

Eliza Baker died May 12, 1905. Robert Baker died June 29, 1905. Eliza Baker, at the time of her death, was eighty-four years old. Robert Baker was eighty-eight.

The land conveyed consisted of 280 acres. The testimony shows that, at the time of the conveyance, it was worth from \$40.00 to \$45.00 an acre.

In considering the question of Robert's competency to make this deed, the ultimate question relates to the time of the making of the deed, to wit, July 19, 1899. We are inclined

to think from the record that he was never considered intellectually strong. The mother, Eliza, seems to have been the stronger and the dominative character. She seems to have been the head of the family. He was, at the time this deed was made, about eighty-three years of age. There is nothing

1. Deeds: undue influence and mental incapacity: combination of: effect.

to indicate that his health was not normal for a man of his years. The only physical defect to which this record points in Robert was a weakness of the eyesight. The only peculiarity in his conduct, emphasized by the testimony, is that he did not talk much; that he claimed he was a prize fighter. Whether this was said in jest or in earnest does not appear. Nor does the date when he made these assertions appear. There is some testimony to the effect that Robert sometimes talked childish. This testimony, however, in some instances, is qualified by the statement that this was when he got excited. Some of the witnesses testified that he claimed he got lost on the road, but the same witness stated that in the conversation he couldn't distinguish whether the difficulty was with his mind or his eyesight—that it was a fact that he couldn't see good.

Some of the witnesses testified that he indicated by his talk that he thought that he was a pretty good man physically; that he used to tell how he could knock fellows down. There are many old men who, never having been put to the test, imagine themselves quite as good physically as when they were much younger. At least they like to convey that impression, and are inclined to boast of their youthful prowess. It is difficult for some men to realize that their physical powers are abated. It is hard for them to see themselves as others see them. Age comes on insidiously. Physical changes come with advancing years. Each day brings its changes. Each year lessens the physical vigor. Some old men dye their hair. Some old men have a foolish vanity to appear young. This is not insanity. It is the egotism of old age.

The fact, if it be a fact, that he was not given much to conversation in and about the home may be traceable, as it often is traceable, to the superior qualifications of his better half in that sphere of human activity. The testimony tends to show that Mrs. Baker was a woman of strong and vigorous mind, quite given to having things her own way, quite a potential factor in the social and business life of the family, and quite inclined to say what she thought, and that, without

often a thoughtful consideration for the feelings of the person to whom she addressed herself. As one of her own daughters testified, she was rather a strong minded woman. As a matter of fact, she was always at the head of the family. She testified: "As between my mother and father, she was always the stronger character." As characteristic of her manner of speech, note the following instance testified to by her daughter: "I heard a conversation between my mother and the Magill woman about a woolen shawl. The Magill woman came in the room and said, 'Grandma, do you know me?' She said, 'Yes, I know you. Anybody that sees that old mug of yours will know it again,' and she said, 'Didn't you tell me you would give me your shawl?' She said, 'Yes, certainly, I gave the shawl to you, and you said you wouldn't wait.' 'And if you die, you will give it to me?' and she said, 'That is the reason I gave it to you. I am not dead yet.''" The date of this conversation does not appear, but we infer it was at one time when she was suffering from her ailment. It appears that she was suffering from varicose veins, which produced very painful ulcers.

It is apparent from this record that Robert Baker, for many years before he died, had not attempted to transact any business on his own account. The impression that this record makes on the mind, from a careful reading of it, is that he depended almost entirely upon his wife in the transaction of business which related to the home and the family. Whether this was a voluntary and conscious surrender of his right as the head of the family, or whether it was due to a recognition on his part of his wife's greater capability in such matters, or whether it was due to a consciousness of his own weakness, or whether it was due to want of capacity in respect to these matters, or whether it was due to the dominating influence of his wife over him and an assumption of superiority on her part, does not clearly appear; but we are inclined to the opinion that each of the matters suggested

had a potential influence in driving him from the fields of business activity.

The record discloses that the defendant William was rather delicate in health; that he had remained at home during all his life with his father and his mother; that the mother had a great affection for William; that the same tenderness of feeling did not exist between the father and William. At least, we should judge so from certain transactions between them referred to in the evidence. The relationship between the mother and William seems to have been very close. He was the firstborn. We are inclined to think, from this record, that the father was not consulted in reference to the transaction in question, and the transaction did not express his personal wish in the matter. He was old, feeble, never strong mentally, and gradually growing weaker as the years crept on. We are inclined to think from this record that, in so far as Robert was concerned, touching this deed, he did not act of his own free will. His joining in the deed was simply a consummation of the purpose of William and his mother to secure to William this land. We cannot trace his act wholly to incompetency, nor wholly to undue influence exercised over him; but we do find that each had a marked influence in securing his signature to this deed. Naturally weak, enfeebled by old age, dominated by the wife and son, incapable of resisting effectually, if he ever attempted resistance, he yielded, and so yielding, surrendered his interest in the property.

The witnesses in this case were before the trial court. He saw the witnesses, and from their testimony so determined this question. Some force must be given to this finding, although the case is triable *de novo* here. We cannot find from this record that Robert Baker was wholly incapable of making the deed at this time. We cannot find affirmatively, as an independent proposition, that the influence used over him to secure the deed would, under other conditions, in law

2. **APPEAL AND
ERROR:** trial *de
novo*: influence
of judgment of
trial court.

be considered undue influence; yet we do find that these two, combining in the old man and operating upon his mind, produced the results of which the plaintiffs and interveners complain.

A determination of this case involves no new or unsettled propositions of law. What constitutes mental incapacity, such as will void a deed or will, has been defined by this court many times. What constitutes undue influence and makes ineffectual a contract or a will has been frequently explained and applied. Each case must be determined largely upon its own facts, and when and how the rules heretofore adopted

3, 5. DEEDS:
validity: parent to child:
consideration inadequate:
prejudice against children: effect.

shall be applied depends upon the facts disclosed. As has been frequently held by this court, the right of a parent, either by will or by deed, to make such disposition of his property as he may see fit cannot be questioned by his heirs without an affirmative showing that he was incapable of making the conveyance, or that the act was not his because of undue influence exercised upon him. The fact that he is influenced by prejudice against his children, or a special fondness for one child over another, founded upon a rational conception of his relationship to them, is not sufficient to justify the court in undoing what he did. See *Nowlen v. Nowlen*, 122 Iowa 541; *Kennedy v. McCann*, 61 Atl. (Md.) 625; *Justice v. Justice*, 18 Atl. (N. J.) 674.

Yet, where it is shown that the party making the deed was very old and enfeebled by age, that he had retired from all participation in the activities of life, that he was closely associated with and under the control and domination of others, and the conveyance was made to gratify their wish, rather than his own, and where special confidence appears to have been reposed in those who procured him to do the act, which, if sustained, relieves him of his property, the law will not protect the holder of the ill-gotten gain.

The defendant invokes the statute of limitations, claiming

that the plaintiffs are now barred from asserting a right to this land or an interest in it. The statute of limitations that governs here is found in Sec. 3447 of the Code of 1897, subdivision 7, which limits the right to ten years. Under any theory of the case, ten years have not expired. Robert Baker died in 1905. This point needs no further consideration, and the case on defendant's appeal is affirmed.

We come now to the consideration of plaintiffs' appeal. It is contended by the plaintiffs and interveners that the evidence discloses that the deed was procured from Eliza Baker by undue influence, and also that she was mentally incapable of making the deed. This is simply a fact question. Under any theory of this evidence, we cannot sustain the plaintiffs' contention. The fact that the defendant was her son, that she had other children for whom no provision was made, the fact, if it be a fact, that the consideration was inadequate, are not in themselves controlling. They are factors to be considered in determining the ultimate question of mental capacity or undue influence; but, in the absence of any showing of want of mental capacity or of undue influence, this will not authorize the setting aside of the deed. The property belonged to Eliza Baker. She had a right to determine what the consideration should be. She had a right to give it away if she saw fit, providing no undue influence was exercised in procuring the gift, and providing she had capacity sufficient to enable her to understand what she was doing, and the disposition she was making of her property. We find no ground for disturbing the action of the court on this branch of the case, and on plaintiffs' appeal, the case must be and is affirmed.—*Affirmed on both appeals.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

CARL A. BERNER, Plaintiff, v. WILLIAM H. MCHENRY, Judge.

INTOXICATING LIQUORS: Permit Holder—Malt Liquor—Beverage. A permit holder cannot legally sell a malt liquor containing alcohol and which could be and was used as a beverage. To legally sell that which contains a malt liquor its distinctive character must be so changed that it becomes incapable of use as a beverage. Evidence held to show that "Pabst Extract" was a malt liquor.

Certiorari from Polk District Court.—HON. WILLIAM MCHENRY, Judge.

WEDNESDAY, MARCH 17, 1915.

PLAINTIFF was found guilty of the violation of a liquor injunction, and a fine of \$200.00 was imposed. He brings the case here by certiorari. The petition is dismissed, and the judgment—*Affirmed*.

Stewart & Hextell, for plaintiff.

M. S. Odle, for defendant.

PRESTON, J.—Plaintiff is the proprietor of a drug store in Des Moines and is a registered pharmacist.

1. **INTOXICATING LIQUORS: permit holder: malt liquor: beverage.** He is charged with, and admitted, selling Pabst Extract. He did not claim to be operating under the now defunct mulct law.

Witnesses purchased a bottle of the extract from plaintiff's clerk, for which they paid twenty-five cents. It was identified as an exhibit and offered in evidence. The label thereon was also offered in evidence. It is as follows:

"Pabst Extract. The best tonic. Not over five per cent alcohol. Contains 12 oz. A liquor preparation of malt and hops. Pabst Milwaukee trade mark, with a B in the center.

Pabst Brewing Company, Milwaukee, Wisconsin, U. S. A. Guaranteed by Pabst Brewing Company under the Food and Drug Act June 30, 1869. Serial No. 1921. Combined with calciumhypophosphite and ironpyrophosphate."

The other side of the bottle: "Pabst Extract the best tonic. Under the above name we manufacture this liquor preparation of malt and hops. It is not offered as a cure-for-all remedy, but we are satisfied that it will fully meet the demands of the medical profession and a general public as the most efficacious, remedial agency to build up the constitution, strengthen the nervous system, restore sound, refreshing sleep, promote a good digestion, insure a healthy appetite, and God-send to nursing mothers, it is a purely medical preparation and not sold as a beverage.

"Directions for using: Loss of appetite, a wine-glass full taken half an hour before each meal and before retiring at night will soon restore a healthy appetite.

"Dyspepsia. Discontinue the use of ice water, coffee, milk and all strong liquors, and use the best tonic especially with each meal or luncheon. Quick relief will be the result.

"Persons suffering from the loss of sleep should take a wine-glass full, two or more if necessary, every night before retiring.

"Nursing mothers should use the Best Tonic liberally at every meal and luncheon. It will strengthen for the ordeal and produce abundant food for the child.

"Consumption. Consumptives or those suffering from fevers and other wasting diseases, or those unable to partake of or retain solid food, will derive great benefit from a liberal use of the Best Tonic. Cod Liver Oil is most easily taken with the best tonic, the latter preventing nausea and aiding the ready assimilation of the oil.

"Coughs and Colds. A wine-glass or two of the best tonic sweetened with sugar, taken hot before retiring at night will afford relief and assist in breaking up the most obstinate cold.

"Convalescents. Those recovering from any sickness will find that they will get strength and health back with surprising rapidity if they use the best tonic.

"Dose. A wine-glass at each meal and one before retiring which equals one bottle each day. Pabst Brewing Company."

There is evidence from some of the witnesses that they bought Pabst Malt at other places and drank it as a beverage. Two witnesses testify that it tastes like beer. That they had bought it at the saloons. The witness who purchased the bottle in question testifies that at that time, and before he bought the extract, he inquired of the clerk and tried to buy some whisky, and then asked for the malt which he saw there. There is no evidence that it was purchased to be used as a medicine. Witness says that he did not use it for a beverage or buy it with the intention of drinking it; that he got it so that he could report it.

The plaintiff, Berner, testifies that he kept only a small quantity of this extract and that there was but little call for it. He says that he has not been selling except on doctors' orders; that he files the prescriptions away; that he only sells it on doctors' written orders. But the sale in this instance was not made in that manner. He produced and offered in evidence a ruling of the Treasury Department at Washington that this extract was not subject to the revenue tax.

Other witnesses give it as their opinion that the extract is not suitable for use as a beverage. Some of these are medical witnesses. One of the doctors says that he calls it a malt tonic, and that he has prescribed it many times, and it is prescribed as a medicine; that he has never known it to be used as a beverage; that it is not palatable; says he has never analyzed it, and was asked this question on cross examination:

Q. "You would say it is a malt liquor?"

A. "Yes, but it is not a beverage."

Another medical witness was asked:

Q. "What effect does that calciumhypophosphite have on it?"

A. "It is introduced in there to get the phosphorus as a tonic to the nerves."

Q. "And the ironpyrophosphate?"

A. "Both for the iron and phosphate. The bitter taste is due principally to the iron and hypophosphate of calcium and pyrophosphate of iron."

The evidence does not show the amount or proportion of these ingredients in this liquor. A wholesale druggist testified that this extract is considered as simply a medicinal preparation, and stated that he did not consider it as a malt liquor.

This is the substance of the evidence, although we have not attempted to give all of it.

The errors assigned are: First, that there was no sufficient or competent evidence upon which the court could find that the contents of the bottle in question was a malt liquor; second, the evidence was conclusive that it was purely a medicinal preparation, and that the court erred in holding that the sale of a malt medicine is in violation of Sec. 2385 of the Code and Sec. 2382 of the Code and Supplement; third, that the court erred in holding, as it did, that, "This bottle before me professes on its face to contain alcohol and malt. That being so, it is and must be and can only be a malt liquor which the statutes prohibit the selling of by any druggist. Even those holding permits cannot sell a malt liquor which is a liquor made of malt and alcohol. If it contains those two elements it is a malt liquor."

Plaintiff's proposition, as he states it, is that Sec. 2382 does not apply to the case under consideration, nor does the first half of 2385; and second, that a registered pharmacist has the authority to sell liquid preparations as a medicine even though such preparations contain malt and a small per cent of alcohol, or both, if said preparation is so compounded with

other ingredients as to lose its distinctive character as an intoxicating liquor and is no longer desirable as a stimulating beverage, but is in fact a medicine and sold for such purpose only, and cites in support of his proposition the last half of Code Sec. 2385 and the following Iowa cases: *Application of Henery*, 124 Iowa 358; *McNiel v. Horan*, 153 Iowa 630; *State v. Gregory*, 110 Iowa 624; *State v. Laffer*, 38 Iowa 422.

As before stated, the plaintiff, in his second proposition, contends that a pharmacist has authority to sell a liquid preparation as a medicine even though it contains malt and alcohol, or both, if it is in fact a medicine and sold for that purpose only.

It will be observed that the testimony in this case does not show that the sale made by plaintiff's clerk was made for medicinal purposes, nor that it was sold upon a physician's prescription, but shows that it was sold to the party who had called for whisky. If it was sold as a beverage, then under the authorities and the evidence in this case, there can be no question but that it is such a liquid as may be used as a beverage, and therefore prohibited. In other words, if its distinctive character as an intoxicating liquor was so destroyed that it could not be used as a beverage and it became in fact a medicine to be used for diseases, and of such a character that it could not in reason be styled or used as an intoxicating drink, its sale was not in violation of law. We do not understand the statutes and decisions to be as broad as plaintiff states in his second proposition in regard to sale by pharmacists of malt liquor.

The statute, Sec. 2385, provides in the first part of the section that persons holding permits may sell and dispense intoxicating liquors, not including malt liquors, and the second part of the section is, that registered pharmacists . . . may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, etc., but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound under

any name, form or device which may be used as a beverage and which is intoxicating in its character.

Some of the definitions for liquor are:—Any liquid substance, as water, milk, blood, sap, juice or the like; (2) specifically alcoholic or spirituous fluid, either distilled or fermented, as brandy, wine, whisky, beer, etc. Webster's International Dictionary.

We are of the opinion that, under the evidence in this case, the substance sold by plaintiff is a malt liquor and such as prohibited by the statutes, and that it comes within the holdings of this court in *Sawyer v. Botti*, 147 Iowa 453; *State v. Colvin*, 127 Iowa 632. It contained alcohol, and could be and was used as a beverage.

In the *Botti* case, it is pointed out that Sec. 2382 of the Code prohibits the selling or keeping for sale, etc., of "any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquor and all intoxicating liquor whatever," except as otherwise provided, and it was said that "It is apparent, therefore, that the prohibition is twofold; first, of the sale of any liquor which is in fact intoxicating, and second, of certain described liquors whether intoxicating or not. In the second class are enumerated beer and malt liquor, and if the beverage in question is beer or malt liquor, then the fact that it is so manufactured as not to be intoxicating in its ordinary use as a beverage is immaterial;" citing cases.

It follows then that the conviction was right. The defendant moves that he have judgment in this court against the plaintiff for \$25.00 attorney's fee in this court, which is allowed and will be taxed. The certiorari proceedings are dismissed and the judgment—*Affirmed*.

DEEMER, C. J., EVANS, LADD and WEAVER, JJ., concur.

CLARA BLACHLY, Plaintiff, Appellant, v. CHARLES BLACHLY
et al., Appellees.

DIVORCE: Custody of Children—Modification of Decree—Service by Publication—Jurisdiction. The court has no power to order a service by publication in an application to modify a decree of divorce. A service by publication unless in strict accord with the statute is a nullity. (Sec. 3534, Sup. Code, 1913.)

PRINCIPLE APPLIED: A party to a divorce proceeding who had been denied the custody of a child, filed application for the modification of the decree. The judge indorsed thereon an order for the publication of the notice in a named newspaper for a named time and fixed the hearing thereon at a time which was not the commencement of a term of court as required by Sec. 3514, Code. Publication was so made. *Held*, no jurisdiction was acquired.

Certiorari to Polk District Court.—HON. HUGH BRENNAN,
Judge.

WEDNESDAY, MARCH 17, 1915.

AN application was filed, in an original divorce case, by defendant, Charles Blachly, to modify a decree of divorce, asking that the custody of the child of the parties to the original action, which in original decree was awarded to plaintiff, be now awarded to the defendant, Blachly. Plaintiff and the child are nonresidents of Iowa and were at the time notice of such application was given. The notice was by publication. Plaintiff appeared specially and objected to the jurisdiction of the court to hear the application. The court overruled the objection and held it had jurisdiction. Plaintiff brings the matter here for review by certiorari. The judgment and order of the District Court overruling plaintiff's objection to the jurisdiction is reversed and annulled.

H. L. Bump and Guy A. Miller, for plaintiff.

McHenry & DeFord and Morton Weldy, for defendants.

PRESTON, J.—The facts are not disputed. It appears from the record that a decree of divorce was entered in the case of Clara Blachly v. Charles Blachly in June, 1913, grant-

1. DIVORCE: cus-
tody of chil-
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diction.

ing to the said Charles Blachly a divorce and giving the custody of the minor child, Frances, aged five years, to the mother, and allowing the mother a sum of money for the support of the child. Soon after the decree was rendered, the mother moved to the state of Kansas and has remained there ever since and has kept with her the child. The defendant resides in Iowa and did at the time the applica-

tion was made, on August 6, 1914, to modify the decree. The defendant attempted to obtain jurisdiction by publishing a notice citing the said Clara Blachly to appear and defend at a date which was not the commencement of any term of court. On the day the application was filed, the judge made an entry on the bottom of the application directing that notice of hearing on said application be published four weeks in the Des Moines Daily Record, and set the hearing for September 4, 1914. The first day of the September term was September 11, 1914. The order which the court entered on the bottom of the application, or petition to modify decree, was not entered of record. The notice was published in accordance with the order.

The plaintiff appeared by counsel specially and objected to the jurisdiction of the court on the grounds: first, that the court had no jurisdiction of plaintiff or the child because they were at that time domiciled in the state of Kansas; second, that the original notice of the hearing of this petition, filed August 6, 1914, was insufficient and did not comply with Sec. 3514 of the Code, and did not cite the plaintiff to appear on the first day of any term of court; third, that the original notice did not contain all the requirements of the statutes with reference to notices and is, therefore, void and of no effect; fourth, that the original notice gives the court no jurisdiction of the parties for the reason that it was not

published as required by law; and fifth, that the court has no jurisdiction of the plaintiff or the child or the subject matter of this application.

Sec. 3180 of the Code provides that when a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects, when circumstances render them expedient. It is conceded by counsel for both parties, as, of course, it must be, that this section makes no provision for giving notice. But notice must be given. *Hamman v. Van Wagenen*, 94 Iowa 399.

It is true that in that case the modification of the decree was made by a judge in vacation, and without notice. But it cannot be seriously contended that a decree of divorce could be modified upon the application of one party and alimony increased or decreased, or the custody of children changed, without notice to the other party. Counsel for defendants say that the removal from the state by one or both parties to a divorce decree does not extinguish the jurisdiction of the court entering said decree to subsequently modify the same, citing, *Andrews v. Andrews*, 15 Iowa 423. And that jurisdiction to modify a decree of divorce with respect to the custody of children inheres in the court granting said decree, and, for the purpose of considering the question of such modification, the parties are considered in law to be in court at all times, and that only a reasonable notice to the parties to be affected is required (citing cases).

These propositions are not disputed by plaintiff. Conceding their correctness, for the purposes of this case, still notice must be given. Sec. 3534, Code Supplement, 1913, provides that service may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state in either of the following cases. Then follow ten subdivisions, stating the cases wherein notice by publication may be given. This section has reference to the

commencement of an original action, but there is no other provision of the statute for notice by publication applicable to a case like the present. It is probably correct to say, though we are not now called upon to determine, that such application as was here made is not, strictly speaking, the commencement of a new action; that had personal notice been given to plaintiff of the hearing to modify the decree the method pursued would have been sufficient, and that reasonable notice would be all that is required. But notice by publication is wholly statutory. The legislature could, doubtless, authorize notice such as was given in this case, but it has not done so, and the court may not do so without statutory authority. In some probate matters, and perhaps others, the court may prescribe notice because in such cases it is authorized by statute. The court may not so proceed in a case like the present unless it is under the general statute for publication of notice and a compliance with such statute. Though Sec. 3534 does not expressly authorize notice by publication in cases for modification of a decree of divorce, yet paragraph eight thereof does authorize such notice in divorce cases. The present proceeding is to modify a divorce decree, the jurisdiction of which, under the statute, has not been lost, so that, had defendants proceeded under and complied with the general statute in regard to publication, the court would doubtless have had jurisdiction. As it is, there is no authority for notice by publication other than the general statute.

In *Bisby v. Mould, Judge*, 138 Iowa 15, decided before the later amendments to Sec. 3534 of the Code, as it now appears in Code Supplement, 1913, notice was given by publication in an action for annulment of marriage, and it was held that, as the statute did not then provide for notice by publication in such a case, there was no authority for the publication of notice, and no jurisdiction under such publication. The court said, referring to the statute on annulling marriages:

"The initial section of the chapter provides that the district court of the county where either party resides shall have jurisdiction in all actions authorized thereby; but there is nothing in the chapter having reference to the subject of how jurisdiction of the person of the defendant shall be acquired. Going to the general chapter on the subject of the manner of commencing actions, it is provided in Sec. 3514 that 'an action shall be commenced by serving the defendant with notice'; that is, by notice personally served on the defendant. To this rule there are some exceptions. Among others, it is provided in Sec. 3534 that: 'Service may be made by publication when an affidavit is filed that personal service cannot be made on the defendant in this state, in either of the following cases: . . . (8) Where the action is for a divorce, if the defendant is a non-resident of the state, or his residence is unknown.' . . . The rule is for personal service. Constructive service is allowable only where expressly authorized by statute. The statute authorizes constructive service only in actions for divorce, and, as the statute does not, so we are not authorized to extend the provisions of Sec. 3534 to an action to annul."

"Statutes everywhere exist authorizing constructive service of process by publication in certain cases where personal service cannot be had. These statutes are in derogation of the common law and hence are to be strictly construed and literally observed." 32 Cyc. 467. *Priestman v. Priestman*, 103 Iowa 320, 323.

The same rule applies to personal notice outside the state. In 32 Cyc. at 489, it is said that:

"Personal service outside the state is frequently provided for by statute as a substitute for and an equivalent to service by publication. . . . The procedure is wholly statutory, and the provisions of the statute must be observed as carefully as in case of service by publication."

Under a statute directing that an order be made requiring an absent defendant to appear, and, if it cannot be served, that notice be given by publication, the court, in *Jennings v. Johnson*, 148 Fed. 337, at 339, said:

“No principle is more vital to the administration of justice than that no man should be deprived of his property without notice and an opportunity to make his defense. When he is within the territorial jurisdiction of the court, notice is uniformly given by the issuance and service of process calling on him to defend. In the absence of express statutory authority, there is no power in a court to order actual personal service of process upon a defendant beyond its territorial jurisdiction. We know of no federal statute which authorizes the circuit court to direct the issuance and service of process on a defendant who is not within the territorial jurisdiction of the court. The statute which we have quoted—and it is that alone which confers jurisdiction on the circuit court in a case like this—directs that an order be made requiring the absent defendant to appear, plead, answer, or demur to the plaintiff’s declaration, petition or bill . . . within a designated time. It contains only the direction ‘that service of process be made on the defendant by the marshal for the northern district of the state of California, and, in default thereof, that service be had by publication.’ ”

We are of opinion that, there being no statutory authority for publication in the manner attempted in this case, there was not jurisdiction to hear the application to modify the decree. The ruling of the trial court on plaintiff’s objections to the jurisdiction was erroneous. The writ is sustained, and the ruling of the trial court is annulled and reversed, with directions to the district court to sustain the objections.—*Reversed and annulled.*

DEEMER, C. J., EVANS, WEAVER, JJ., concur.

MARY E. HALL, Appellee, v. HARRISON FEAGINS, Appellant.

NEW TRIAL: *Petition for Filed Within Year—Amendment After Year.* A petition for new trial may be filed as late as one year after the entry of judgment under exceptional circumstances. (Sec. 4092, Code.) But, conceding that such petition is amendable, it must be perfected within said one year. New and independent grounds for new trial cannot be injected into the petition under cover of amendments filed *after* said one year.

Appeal from Davis District Court.—HON. F. W. EICHELBERGER, Judge.

WEDNESDAY, MARCH 17, 1915.

ACTION at law to establish boundary between tracts of land. The opinion states the case.—*Affirmed.*

T. P. Bence, for appellant.

Payne & Goodson, for appellee.

WEAVER, J.—This action was begun to settle a disputed boundary line. Originally the line had been marked by a rail fence. Later, a wire fence had been built and among the material fact questions upon the trial was the inquiry whether the wire fence stands substantially upon the site of the old rail fence and whether the wire fence had existed and been acquiesced in as marking the line for more than ten years.

The latter question turned upon whether the wire fence had been built in 1899, as claimed by the plaintiff, or in 1902, as claimed by the defendant. Each of these theories, it is said, was supported by an array of witnesses, but their testimony is not found in the record. The trial

1. **NEW TRIAL:**
petition for
filed within
year: amend-
ment after
year.

court found for the plaintiff that, while the wire fence was not on the site of the old rail fence, it had nevertheless been built and acquiesced in for more than ten years and judgment was therefore rendered in her favor. More than three days after this judgment entry, but within the year, defendant filed a motion for new trial on the ground of newly discovered witnesses by whom it could be shown that the wire fence was not built before the year 1902. More than a year after said judgment was entered, he amended his petition, alleging recent discovery of the fact that plaintiff in another lawsuit with another person involving an extension of the same fence had testified under oath that the wire fence stands on the site of the old rail fence and that she claims no land north of the location of that fence. This amendment was stricken on motion of the plaintiff because it states a new and additional ground for a new trial and was not filed within one year after the judgment was entered.

The single question presented by the appeal is whether the trial court erred in holding this amendment too late and striking it from the files. We think there was no error in the ruling. It may be conceded that an amendment to a motion for new trial which does not introduce a new ground for such an order is allowable. *Souden & Co. v. Craig*, 20 Iowa 477; *Dutton v. Seevers*, 89 Iowa 302; *Means Bros. v. Yeager*, 96 Iowa 694; *Guth v. Bell*, 153 Iowa 511.

But the appellant fails to bring his case within this rule. The *Guth* case, *supra*, on which reliance seems to be placed, is not an authority in his favor. There the petition for new trial expressly alleged the falsity of the plaintiff's testimony and the amendment alleged that after said first trial and in the trial of another case plaintiff had stated facts wholly inconsistent with the truth of his testimony in the original case. Such allegation was clearly germane to the grounds for new trial stated in the petition therefor and the amendment was properly sustained. In the case before us there is no charge or allegation in the petition for new trial that the

plaintiff testified falsely. Nowhere in the record is plaintiff's testimony or the testimony of any other witness set out. There is nothing in the record to indicate that she did not testify in this case as she did in the later case against the other party. Indeed we have the statement of defendant's counsel in the petition for new trial that plaintiff did try her case on the theory that her wire fence was on the line of the old rail fence and he makes it a ground of complaint that he was thereby misled. In other words, plaintiff would appear to have been insisting in both cases upon the line of the old rail fence and claiming that such line was identical with her wire fence. Her testimony in her case against the third person was therefore entirely consistent with her contention in this case, although it may not be entirely consistent with the view of the facts which the trial court seems to have adopted in entering judgment in her favor. If, however, we were to treat the amendment as averring that plaintiff had testified falsely on her first trial, we think it would be an allegation of new and independent matter or ground for new trial, which cannot be imported into the petition after the year for applying for such relief has expired. Substantially all the new testimony mentioned in the original petition has sole reference to the time when the wire fence was built and not to its location with reference to the rail fence. Had the amendment been allowed to stand and had all the allegations of the amended petition stood undenied, we could not disturb the order denying the new trial. The record is not complete. The testimony, as we have already said, has not been preserved and the presumptions are all in favor of the rulings complained of. So far as we can tell, the newly discovered evidence may have been clearly cumulative. If so, no other course was open to the court but to deny the application.

We find no error in the record and the judgment below is—*Affirmed*.

LADD, EVANS and PRESTON, JJ., concur.

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**T. H. HEMPHILL, Appellee, v. CEDAR RAPIDS and IOWA CITY
RAILWAY and LIGHT Co., Appellant.**

EVIDENCE: Similar Contract with Others—Railroad Crossings.

- 1 the issue whether a railway company had agreed to put in an undercrossing for plaintiff, evidence is admissible that the agents for the railroad had agreed with plaintiff's neighbor to put in such a crossing for the neighbor in connection with the crossing for plaintiff.

EVIDENCE: Parol to Prove Agreement to Provide Railroad Crossing.

- 2 Parol evidence is competent to show an agreement by a railway company to furnish a railway crossing at a particular point, inasmuch as plaintiff was entitled to a crossing and the point in question was the only available place for a crossing.

RAILROADS: Undercrossings—Duty to Maintain in Safe Condition.

- 3 A railway company must maintain an undercrossing in a reasonably safe condition, it being shown that the company had agreed to provide the crossing at that point and had left an opening in partial compliance with its agreement.

RAILWAYS: Defective Crossing—Use by Owner—Knowledge of De-

- 4 **fect—Contributory Negligence.** A landowner is not guilty of contributory negligence in permitting his stock to use a defective crossing unless he knew or ought to have known that it was dangerous and imprudent for the stock to use it.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

WEDNESDAY, MARCH 17, 1915.

ACTION at law to recover damages for a horse, killed at what plaintiff alleges was a private under-crossing of defendant's right of way. Trial to a jury; verdict and judgment for plaintiff; and defendant appeals.—*Affirmed.*

Wade, Dutcher and Davis and John A. Reed, for appellant.

A. E. Maine, for appellee.

DEEMER, C. J.—Plaintiff is the owner of a tract of land in Johnson County, Iowa, which is intersected by defendant's right of way, over which it runs an interurban railway.

He alleges that by an arrangement with defendant's officials at the time they obtained its right of way over his land, they agreed to give him an under-crossing over the right of way at a point where a bridge was necessary, by reason of the contour of the land, and to take care of the surface water by leaving an opening in the right of way. He also alleged that there was no other place suitable for any kind of a crossing, and that while gates were put in the railway fence at one time for a grade crossing, the company did not furnish that crossing, but took out the gates; and after constructing its railway and putting in a bridge at the place in question, it brought its right of way fences down to the abutments of the bridge; arranged for a private crossing for plaintiff's neighbor, Cole; and left the remainder of the space under the bridge open, so that plaintiff's stock might pass from one part of his land to the other.

He further charged that this space between the bents of the bridge became and was miry at certain times of the year, and that defendant did nothing to keep it in repair; and that some time in April of the year 1912, one of plaintiff's horses mired at this part of the crossing and was drowned in consequence of the miry condition of the ground.

The defendant's answer was, in effect, a general denial; although it admitted the construction of the bridge at the point in question, but alleged that said construction was for the purpose of drainage only and not to give plaintiff a crossing.

II.—Plaintiff, over defendant's objections, was permitted to prove the kind of crossing which the defendant gave to plaintiff's neighbor, Cole. Ordinarily this would be inadmissible; but here Cole was introduced as a witness, and he testified that one of defendant's agents told him (Cole) that they (the defendant) would put in, under the bridge,

1. EVIDENCE:
similar con-
tract with
others: rail-
road cross-
ings.

an under-crossing for him with (plaintiff) Hemphill's. This made the testimony complained of admissible.

Plaintiff was also permitted to give oral evidence of what defendant's agents said as to a private crossing for him, when negotiating for a right of way over his land, and when taking the deed.

At the time the testimony was received, the relations to the defendant company of the men with whom the conversations were had were not shown; but these were afterward supplied. If the case depended wholly upon this agreement, there might be some doubt as to the admissibility of the testimony; but it does not do so. Plaintiff was entitled to a crossing of some kind under the law; and under the testimony, which shows that no other place was available, and that a bridge was necessary at the point in question, we think it was competent to show by parol that it was agreed between the parties that the crossing should be at this place. This is particularly so here, because the defendant so located the bridge and so constructed its fences as to leave this the only available crossing whereby plaintiff could get from one part of his farm to the other.

III.—The theory on which the case was tried appears from the following instructions given by the trial court:

"Now, you are instructed that if you should find from the evidence, that the defendant through its authorized agents or representatives agreed to put in a crossing under this bridge for the use of the plaintiff's father and that in building the road and fencing the same the said defendant in any manner attempted to comply with this agreement that then and in that event it was the duty of the defendant company to keep such crossing in reasonable condition for the passage of stock and if it allowed the same to become dangerous and plaintiff's horse was injured or damaged by reason thereof the defendant would be liable and you should so find, but if

you do not so find you will find for the defendant. You are further instructed that before plaintiff can recover in this action he must show you by a preponderance of the evidence that the damage to the horse, if any, was not due to any fault or neglect on his part. In other words, that he was not guilty of contributory negligence. By contributory negligence as used in this instruction is meant the doing of something or the failure to do something that a reasonably careful and prudent person would do or would not do under like circumstances."

The case was not submitted, as appellant contends, on the theory that there was a breach of defendant's duty to comply with its contract to give plaintiff a crossing, but

upon the proposition that if it attempted to comply with its contract and left a place open for plaintiff's stock to pass, in partial compliance with its contract, then it was defendant's duty to keep the crossing in a reasonably safe condition for the purpose for which it was being used. This theory of the case seems to be correct. It was the legal duty of the company to keep its crossings in a reasonably safe condition; and if it failed in that, it was responsible for all damages which resulted proximately therefrom. *Miller v. Railroad*, 66 Iowa 546; *Guinn v. Railroad*, 125 Iowa 301.

IV.—Whether or not plaintiff was guilty of contributory negligence in allowing his horse to use the crossing at the time he did was made a jury question by the court in its instruction No. 51½, which was given on its own motion.

No such issue was tendered by the pleadings and the court might well have ignored the proposition. However, the defendant insists that under the testimony as applied to this instruction, there should have been a verdict for it. We do not so read the record. It was, as we think, a jury question. There is

3. RAILROADS: undercrossings: duty to maintain in safe condition.
4. RAILWAYS: defective crossing: use by owner: knowledge of defect: contributory negligence.

no testimony that plaintiff knew that the crossing was so dangerous at the time in question as that his horse was likely to mire and drown, and as defendant left the place open and it had been used as an under-crossing, it was under an affirmative duty to keep the place in a reasonably safe condition and plaintiff was justified in using it unless he actually knew or should have known that it was in a dangerous condition and that it was imprudent to use it. The case is somewhat akin to sidewalk cases, where a municipality is under a duty to keep its walks in repair.

We discover no prejudicial error and the judgment must be and it is—*Affirmed*.

LADD, GAYNOR and SALINGER, JJ., concur.

EMELIA A. HOLMQUIST, Administratrix, Appellant, v. C. L. GRAY CONSTRUCTION COMPANY, Appellant, and CITY OF DES MOINES, Iowa, Appellee.

MUNICIPAL CORPORATIONS: Duty as to Streets—Reciprocal

- 1 **Rights and Duty of City and Property Owner—Negligence.** Liability of a city by reason of the condition of its streets must rest on some breach of its statutory duty (Sec. 753, Code) over its streets. In determining whether the city has breached its duty, it must be remembered that the private property owner, during his building operations, has a right to a reasonable use of the street and the conduct of the city must be fairly judged in the light of that fact.

PRINCIPLE APPLIED: A brick building, flush with the lot line, was erected on the north side of a street. For four months after construction started, barriers excluded people from the sidewalk. They were then removed at the request of the superintendent of streets so that people going to the State Fair could use the sidewalk, and it was thereafter so used. The ordinance duties of the superintendent did not appear. The builder made no objection to the request for the removal of the barriers, nor did he indicate to the commissioner that such removal would be dangerous. When the barriers were removed the front wall was up about half way, 20 feet. A new barrier extending from a point inside the sidewalk to the building was erected when the first

barriers were taken down. Lumber was piled in front of the building on the edge of the sidewalk and street. The sidewalk on the south side of the street was always open, as was the street, aside from the lumber aforesaid. No material was hoisted from outside the building. No covering was ever built over the sidewalk nor were warning signs posted. An ordinance prohibited the obstruction of the sidewalk "pavement" by building materials and required builders to build roofs over sidewalks during construction. The front wall was in time completed, 45 feet high. During a high wind, blowing 40 miles per hour, a workman on top of this wall, reaching up and out and pointing up the wall, was blown off and in his fall killed a pedestrian on the sidewalk below. There was no showing that the city knew that workmen were, or had been, pointing up this wall in high winds by leaning out over the top thereof. *Held*, (a) the order of the superintendent was not a negligent act, (b) nor did it create a nuisance, and (c) no negligence on the part of the city was shown. (In this case the ordinance was introduced against the city without objection. It was excluded as to the other defendant.)

NEGLIGENCE: Proximate Cause—Causal Connection. Liability

- 2 must be predicated on a cause that is proximate. In instant case, held that the order of a commissioner of public streets to a building contractor to remove barriers which excluded pedestrians from the sidewalk was not the proximate cause of the death of a pedestrian who was killed by being struck by the body of a workman blown from the building by a high wind.

PRINCIPLE APPLIED: (See preceding application.)

NEGLIGENCE: Unusual and Unforeseen Accidents—Ordinary Care—

- 3 Workmen Blown from Building. Whether a builder erecting a building near and adjacent to a public street should, in the exercise of ordinary care, have provided barriers, warning signals or a covering over the sidewalk, and thereby guarded against the unusual occurrence of a workman being blown from the walls upon a passer-by, *held* to be a jury question.

PRINCIPLE APPLIED: (See preceding application.)

NEGLIGENCE: Contributory per se—Facts Not Constituting.

- 4 Whether a pedestrian walking along a public street in front of a building in process of erection and hit by a falling workman who was blown from the building was guilty of contributory negligence, *held* to be a jury question.

PRINCIPLE APPLIED: (See preceding application.)

NEGLIGENCE: Barriers on Streets—Removal on Orders of City—

- 5 Effect on Builder's Liability. The removal, in compliance with

orders of a city official, of barriers over a sidewalk in front of a partially erected building, will not absolve the builder from liability if the builder in the exercise of ordinary care knew that such removal would open up an avenue of danger to passers-by. Orders or no orders, the builder must exercise reasonable care.

PRINCIPLE APPLIED: (See preceding application.) In addition to preceding facts, the builder when he complied with the request for removal of the barriers did not inform the official, who did not know the real condition, that the order was premature and that there was danger in such removal.

NEGLIGENCE: Act of God—When no Protection. One will not be permitted to screen himself behind an act of God, when his own contributory negligence concurred with such act to bring about the accident.

PRINCIPLE APPLIED: (See preceding application.)

Appeal from Polk District Court.—HON. JAMES P. HEWITT, Judge.

WEDNESDAY, MARCH 17, 1915.

THIS is an action at law brought by Emelia A. Holmquist, Administratrix of the Estate of John A. Holmquist, deceased, because of the wrongful acts of the defendants. Trial to a jury. At the close of the evidence both defendants moved for a directed verdict. The motion was sustained as to the defendant city and overruled as to the construction company. There was a verdict and judgment for plaintiff and against the last named defendant for \$6,000.00. The plaintiff first appealed from the directed verdict against her and in favor of the city. Later, the defendant construction company appealed.—*Affirmed on both appeals.*

Thos. A. Cheshire, for appellant, Emelia A. Holmquist, Administratrix.

Parker, Parrish & Müller, for C. L. Gray Construction Company, appellant.

H. W. Byers, R. O. Brennan and Eskil C. Carlson, for appellee.

PRESTON, J.—It is alleged that the defendants maintained and permitted a nuisance and were negligent in the following particulars:

1. In failing to erect, or cause to be erected, over the sidewalk, adjacent to and in front of the wall that was being constructed, a safe and suitable covering of boards, so that pedestrians walking along in front of said building would be protected from injury by falling workmen or material.

2. In requiring and permitting workmen to work on said wall on the 21st day of October, 1909, with the high wind that was prevailing, making it almost impossible for the men to maintain their positions on the work because of such wind.

3. In creating conditions in the street in front of the building which made the street at that point a public nuisance.

4. In failing to place barriers across the sidewalk and from the curb to the building, preventing the use of that portion of the street by pedestrians.

5. In failing to post in a conspicuous place on either side of the south end of said building, and at and between the curb line and the wall, conspicuous signs warning the public of danger in passing along the street in front of said wall.

6. In violating and permitting to be violated the provisions of Section 757 of the Revised Ordinances of Des Moines.

All but the third and sixth grounds were submitted to the jury, as to the construction company. The court withdrew from the jury the question as to the alleged public nuisance, holding that the evidence did not show a nuisance. The defendant city did not object to the ordinance referred to later, but conceded that it was in force at the time plain-

tiff's intestate was killed. But the construction company pleaded in an amendment to its answer that the ordinance was invalid because it contains more than one subject, and that the provision of the ordinance relating to the construction of barriers, roofs or sheds for the protection of the public is not clearly expressed in the title, and objected to the ordinance on the same ground. The objection was sustained, but the verdict was in plaintiff's favor and against the construction company, and the plaintiff has not appealed from that ruling. We are not, therefore, called upon to determine the correctness of the court's ruling as to the ordinance.

The two defendants are sued as alleged joint tort-feasors. Some of the questions involved in the appeal by plaintiff are common to those urged in the construction company's appeal. We shall endeavor to state the facts at this time as applicable to both appeals, in order to avoid repetition when we take up the appeal of the defendant construction company. There was no evidence introduced for either defendant, except that the defendant city introduced its chief clerk in the department of streets to show that at some time during the construction of the building in question a notice was served upon the contractor to move from the street certain building material which was close to the car tracks. The notice was not produced and the date of its service is not shown. Many of the facts were conceded, and there is no substantial dispute in the testimony.

It appears that about the 1st of May, 1909, the defendant, C. L. Gray Construction Company, entered upon the erection and construction of the Des Moines Coliseum, which was erected upon private property abutting the north side of West Locust Street, adjacent to the Des Moines River, in the city of Des Moines, Iowa. The south end of the building was built up to the lot line on Locust Street and the building extended north to Grand Avenue. When the construction of the building was begun, barriers were placed across the sidewalk and parking in front of the building, and the public

thus excluded from walking along the sidewalk and the parking near to the building that was being constructed. This barrier was maintained until about the first of September. At that time these barriers were removed by the construction company because of a request, or, as some of the parties claimed, an order for their removal, made by one John MacVicar, who at the time was a member of the city council of the city of Des Moines, having charge of the department of streets and public improvements. The city of Des Moines at that time was operated under what is known as the commission form of government.

The superintendent of the construction company, called as a witness by plaintiff, testified: "John MacVicar called at our office at the building site the week before the Iowa State Fair opened in 1909 and asked me to have the barrier removed so people could pass through on the sidewalk going to the fair, and I told him I would have it done. I do not remember of anything else being said."

In a later part of his deposition, he uses the expression that he received orders from MacVicar to have the sidewalk opened up, etc. When this barrier was removed, it was replaced by a similar barrier being placed about four and one-half feet from the sidewalk to the building instead of extending across the sidewalk. The last barrier was a railing three or four feet high constructed of two by four's, with boards nailed to them. This last barrier was so maintained until the latter part of November. Lumber and other materials were piled in front of the building on the outer edge of the sidewalk. When the position of the barrier was changed, about September first, the south wall of the building had been erected to a height of about twenty to twenty-five feet. On October 21, 1909, the day upon which the deceased, John Holmquist, met with the injuries resulting in his death, the south wall of the building was practically completed. Prior to the day of the death of Holmquist, the building material was hoisted to the workmen from the inside of the structure.

No materials were hoisted from the sidewalk or street. While the wall was being erected, the workmen stood on a scaffold



or platform constructed on the inside or north side of the wall. There were fifteen or sixteen men working on the wall at the time deceased was killed. When the material was

hoisted, the brick and mortar were wheeled to the workmen and placed on a platform or scaffold close to the workmen. There was generally a space of about a foot between the wall and the mortar boards, and the material was just back so the workmen could reach it handily. When the wall got scaffold high, the material was even with the top of the wall.

A little before noon on October 21st, William J. Kennedy, one of the workmen engaged on the building, was removing mortar or pointing up the surface of the wall. He was not at the time engaged in handling brick and setting the same in the wall. He was standing on the roof of a part of the building which was lower than the wall where he was reaching out and up and pointing up the work. There was a jog in the wall, so that the place where Kennedy was reaching to point up the work extended farther south than the place where he was standing.

Several photographs were introduced in evidence. The cross on the one here set out shows the place where Kennedy was standing when he was blown off the roof. This photograph shows the condition of the building but does not show the sidewalk and passageway between the railing and building as well as some of the others.

Kennedy testified:

"I was just reaching—I just finished cutting it (the mortar) all out and I went to straighten up and a heavy wind hit me and threw me off my balance and I went right over the front of the wall. I could not cut off this mortar without reaching and leaning over the wall. At the time I was blown from the building I was standing on the roof, forty-five feet high, on the southwest corner of the roof. I was standing on the southwest corner of the roof and pointing up about five feet. I was not leaning over the wall; I was reaching out that way (indicating). I was leaning out. I was holding on like this (indicating), holding on to the wall. Just after I had finished cutting off, as I turned to come in, step in, the

wind hit me just then. The wind was blowing hard, I should judge about forty miles an hour, and we had to be careful on account of that, and just happened to catch me off my balance."

It was conceded that the deceased was struck while walking east on the sidewalk on the north side of Locust Street and in front of the building; that he was struck by W. J. Kennedy. It was conceded that deceased was struck and killed by Kennedy falling from the building, having been blown off the same as testified to by him, and falling on Holmquist, injuring him, from which injuries Holmquist died soon thereafter, and on that day. At no time was there a scaffolding constructed outside of the south wall, and at no time was there any covering, or shield, over the sidewalk.

The ordinance before referred to is as follows:

"Sec. 757. Sidewalks. Section 3. No material shall be deposited upon the sidewalk pavement in front of or along a street or alley, whereon any such building is being erected, but the sidewalk pavement shall, at all times, be kept clear for the free and unobstructed use thereof by the public. PROVIDED, it is not intended hereby to prohibit the maintenance of a driveway for the delivery of material across such sidewalk from the curb line to the building site. If the building to be erected is to be more than two stories in height, with walls at or near the sidewalk line, there shall be built over the sidewalk pavement a roof, or shield, of planks, thoroughly supported and constructed, as regards size, strength and safety, to the satisfaction of the Board of Public Works, and be maintained as long as they shall deem necessary, sufficient to protect any persons, passing along such sidewalk, from injury by falling material or debris. If there shall be excavations along or near the sidewalk pavement, a substantial railing shall be erected and maintained along such sidewalk so long as such excavations continue to exist, for the proper protection of parties passing along the sidewalk pavement."

Though this ordinance was excluded, so far as the construction company was concerned, the court submitted to the jury the question as to whether, independently of the ordinance, the construction company failed in its duty in regard to passersby on the street. It was also conceded that in August, September and October, 1909, John MacVicar was a member of the council, and, under an ordinance passed by the city, was assigned to the duties of superintendent of the department of streets and public improvements. There was a public sidewalk on the south side of Locust Street that was clear of any obstruction during all the times that the Coliseum was being constructed, so that pedestrians having occasion to use Locust Street had a suitable and safe walk therefor. During all this time the street up to the street car track was free from obstructions aside from material while on the edge of the walk, or the edge of the street, so that people passing could walk around the front of the building in the street, or on the south side of the walk. The public had been using the sidewalk on the north side of Locust Street in front of the building from about September 1st up to October 21st by passing between the material piled on the walk and the barrier which had replaced the former one. There were no placards, or notices, placed on either side of the building warning the public that there was any danger in passing upon the walk.

1. We shall first take up the plaintiff's appeal. There are a large number of assigned errors and brief points. But we think they may be substantially covered by a consideration of the question as to whether the conditions existing in Locust Street in front of this building at the time deceased was killed constituted a nuisance which it was the duty of the city, under Sections 753 [of the Code] and 696 of the Code [Sup. 1907], to prevent; and the effect of the request, or so-called order of MacVicar in regard to removing the barrier which had extended across

1. MUNICIPAL CORPORATIONS: duty as to streets: reciprocal rights and duty of city and property owner: negligence.

the sidewalk. It is plaintiff's theory, as we understand it, that as to both defendants, the conditions existing constituted a public nuisance, for which the defendants are jointly liable, though negligence is also charged. Some of these grounds of negligence apply more particularly, it seems to us, to the construction company.

As to the second ground of negligence alleged, the city had no control over the workmen as to whether they should work when a high wind was blowing. They were in the employ and under the control of private individuals, engaged in the erection of a private building upon private property.

Without regard to the contractor's liability under the law, the liability of the defendant city must be predicated on Section 753 of the Code, which enjoins upon the city the

care, supervision and control of the streets, and to cause the same to be kept open and in repair and free from nuisances. Before plaintiff can recover against the city, it must be shown that the defendant has been guilty of some act of omission or commission amounting to a breach of its corporate duty as prescribed by that statute. It is said by plaintiff that the public nuisance was, in fact, created by the city of Des Moines when its superintendent of streets ordered the Gray Construction Company to remove its barriers across the sidewalk and parking in front of this wall during the last week in August; that the act of Superintendent of Streets MacVicar, in ordering the removal of the barriers across the walk, was the act of the city because at that time the city was operating under the commission plan of government, and that his act in ordering the removal of the barriers was equivalent to the act of the city council of cities that are not operated under the commission plan. The statute, Section 1056-a25, Code Supplement [1907], provides:

"The council shall have and possess, and the council and its members shall exercise all executive, legislative and judi-

cial powers and duties now had, possessed and exercised by the mayor, city council, board of public works, park commissioners, board of police and fire commissioners, board of waterworks trustees, board of library trustees, solicitor, assessor, treasurer, auditor, city engineer, and other executive and administrative officers in cities of the first class and cities acting under special charter. The executive and administrative powers, authority and duties in such cities shall be distributed into and among five departments, as follows: . . . 4. Department of streets and public improvements. . . . The council shall determine the powers and duties to be performed by, and assign them to the proper department; shall prescribe the powers and duties of officers and employees; may assign particular officers and employees to one or more of the departments; may require an officer or employee to perform duties in two or more departments; and may make such other rules and regulations as may be necessary and proper for the efficient and economical conduct of the business of the city."

It is conceded that MacVicar was a member of the city council, and, under an ordinance passed by the city council, he was assigned to the duties of superintendent of the department of streets and public improvements. It is not shown in the evidence that there was any ordinance defining the powers and duties of the councilmen, and there is no showing that they had any powers other than those enumerated in the statute itself. We have some doubt as to whether one member of the council has the same power as the combined body in all cases, as we understand counsel for plaintiff to claim. But it is not necessary to now determine that and consider all the provisions of the act bearing on this question because, in our opinion, the request made by MacVicar, or the so-called order to remove the barriers, was not the proximate cause of the decedent's injury and death. The injury probably would not have happened but for the wind. It

might be argued that if the request or order had not been made by MacVicar, the barrier would not have been removed; if the barrier had not been removed, the deceased would not have been on the walk at the point where he was struck; that if Kennedy had not been blown from the building, and deceased had not been at the precise point where Kennedy's body would strike; and if the wind had not been blowing Kennedy would not have been blown from the building. But we think it is too remote. We are unable to see causal connection between the order itself and plaintiff's injury. *Kirkpatrick v. Ins. Co.*, 141 Iowa 74, 81.

The ordinance before set out is relied upon by plaintiff to some extent, as against the city, as a circumstance tending to show the necessity for a barrier, or railing. Under the ordinance, no railing was required unless there were excavations, and there were no excavations at the place in question. Furthermore, while the so-called order does not relate to the roof or shield over the sidewalk, the ordinance gives the city authorities a discretion as to how long it is necessary to maintain such covering. The purpose of such covering, as stated in the ordinance, is to protect persons passing along the sidewalk from injury by falling material or debris. At the time of the injury to plaintiff's decedent the building was substantially completed; no bricks were being laid, and there was but little, if any, danger of injury from such material or debris. And the record does not show that the city had any notice or knowledge, either actual or implied, of the more or less perilous position of the employees of the construction company in leaning out and pointing up or finishing the work; that is, as to the conditions as they existed at that time. We think the act of MacVicar in requesting, or ordering, the removal of the barriers was not under the circumstances a negligent act on the part of the city, nor did it create a nuisance.

2. As stated, plaintiff claims that the nuisance was created by the city by this order of the superintendent of streets.

The so-called order is also considered as a ground of negligence, and, as we look at the matter, is substantially the only ground of negligence alleged against the city, and what has been said in regard to this order in the prior paragraph of the opinion applies when considered as a ground of negligence.

3. Plaintiff relies upon the holdings of this court in *Duffy v. City of Dubuque*, 63 Iowa 171; *Bliven v. Sioux City*, 85 Iowa 346; *Cason v. Ottumwa*, 102 Iowa 99; *Wheeler v. Fort Dodge*, 131 Iowa 566; and the sections of the statute before referred to. But these were cases where there was an improper use of the street by obstructions, and the like, such as a section of roofing, billboards, and the like, and in one case a sliding wire performance, which were, with the knowledge of the city, permitted. These were cases where the city had not performed its obligation to the public in keeping its streets free from nuisances of such character as were well calculated to result in mishap and to injure pedestrians in the street. We think the cases cited are not applicable here because plaintiff's contention ignores the right of a property owner to a reasonable use of the street for building operations such as were being carried on in the instant case. *Meggins v. Maine & Sons Co.*, 160 Iowa 541, and cases cited.

In determining whether the city had performed its duty under the statute, the duty enjoined upon it by Sec. 753 of the Code must be considered in the light of the right of the landowner to so use the street, in view of such lawful use by the landowner of a portion of the sidewalk and street. The city had the right to assume that the owners of buildings abutting the street, or the construction company, would exercise a proper degree of care to prevent injury to travelers upon the street. *Parmenter v. City of Marion*, 113 Iowa 297.

The appellee relies on the case last cited. The case is, in many respects, like the instant case, and we think is controlling here. In that case it was held that a verdict should

have been directed for the city. The facts were: That plaintiff, while passing along one of the streets of the city, was injured by being struck with a bale of hay that was thrown out of the second story of a building abutting the street. Over the sidewalk, and projecting out from the level of the second floor, was a platform fifteen feet in length and five feet in width. The bottom of the platform was eight feet and six inches above the sidewalk. The sidewalk and street itself were free of obstructions, except as to said projecting platform. On the day plaintiff received her injuries, one Rheinheimer went to the second floor of this building to procure a bale of hay. It was a cold winter day, and a strong wind was blowing from the northwest towards the front of the building. Rheinheimer pulled the bale from its place, dragging it to the door opening on to the platform, opened the door and stepped out on to the platform, at the same time saying, "Look out below"; and, giving the bale a push with hand and knee, threw it over the platform. In its descent it struck plaintiff as she was walking on the sidewalk underneath the platform. The negligence charged was that the defendant city permitted the platform to be constructed and maintained in such a manner that objects falling therefrom were likely to fall upon and injure passersby, and permitted the owner to use the same for the purpose of loading and unloading hay and straw into and from the building, to the danger of those using the sidewalk and street in front of the building, without taking steps to remove or prevent the same. The conclusions reached by the court were:

"1. That the platform itself was neither a nuisance nor an obstruction.

"2. If properly used, as defendant had the right to suppose it would be, its use did not make it a nuisance.

"3. If improperly used in such a manner as to make it a nuisance, the city was not responsible until it had, or should have had, notice or knowledge of its improper use.

. . . It may be (although we do not decide the point) that if he (Rheinheimer) persistently or continuously threw bales of hay from the second story of his building to the sidewalk below, with the knowledge, express or implied, of the city, and thereby endangered the safety of persons using the streets, and the city failed to use reasonable care to stop this dangerous use, it would be liable. But the facts do not justify the conclusion that the city had knowledge of the dangerous use of the platform. But once before, if at all, was this platform used in such a manner as to endanger the safety of those using the sidewalk. We doubt very much if the city could have interfered with the use of the platform as a place for loading or unloading hay, but, however this may be, it was not bound for any negligent or improper use thereof unless it had, or ought to have had, notice or knowledge thereof, and opportunity to prevent the same. There was not sufficient evidence to justify the jury in finding that it was so used as to be a nuisance, or that if so used, the city had notice or knowledge thereof. For these reasons, the defendant's motion for a directed verdict at the conclusion of plaintiff's evidence should have been sustained."

In the instant case, while, doubtless, the city knew, or should have known, of the building operations of its co-defendant, in a general way, it is not shown that the situation as it was at the time of the injury to Holmquist in regard to men reaching out and up and pointing the work in a high wind, or otherwise, had existed before or that the city had any notice thereof. The act of permitting or requiring men to so work under such conditions, if negligent, as the jury must have found as to the defendant, the construction company, was the negligence of the construction company alone.

We conclude that, as to the city, the motion to direct a verdict was rightly sustained, and the ruling and judgment as to the city are affirmed.

4. Taking up now the appeal of the construction com-

pany. There was a duty resting upon this defendant in regard to persons passing on the sidewalk, regardless of the ordinance.

3. **NEGLIGENCE:**
unusual and
unforeseen
accidents:
ordinary care:
workmen blown
from building.

It was a jury question as to whether this defendant was negligent. It is said by this appellant that the immediate or proximate cause of the injury resulting in the death of plaintiff's decedent was the falling of defendant's employee from the building, and that the fall of the employee was purely accidental; that if the employee is not liable, the employer is not liable, and that deceased was guilty of contributory negligence.

While it is true the wall had been practically completed, there was some work to be done upon the wall in pointing up the work. It does not appear from the evidence whether there was to be any other work of any consequence on the outside of the wall. In striking off the mortar, or pointing up the wall, Kennedy stood on the roof, near the edge of the wall, reaching out and up, with his hand holding a higher portion of the wall, and reached around so that his body, to some extent, projected out into the street and over a part of the sidewalk below. He was in such a position as would have caused him to fall on the sidewalk if he were to lose his hold or balance and to fall. As he says, he was blown from the roof. The accident is an unusual one, but the circumstances under which Kennedy was working, where any misstep on his part, or a loosening of his hold, a gust of wind, or any accident might cause him to lose his balance and fall upon the sidewalk below, made his work one of a perilous nature, and Kennedy himself took risks. There was some danger that he might fall to the sidewalk below. There was also hazard to anyone who might be passing along the street below. There is no way that the public could know of the position in which the workmen were placed. This defendant should have known. In the progress of the work of defendant in the construction of the building, an employee is required to place himself in a hazardous or perilous position over a

public way. It is expected, of course, that the employee will use caution for his own safety, and yet there is, nevertheless, some peril not only to the employee but to the passers-by on the street, so that, regardless of any ordinance, and regardless of any request that may have been made by the superintendent of streets, it was a question for the jury to say whether this defendant exercised the care required in such cases, and whether such care required the placing of a covering over the walk, barriers across the street, or a warning of some kind to persons using the street.

One of the instructions given by the court is in substantially the following form: That defendant was required to use ordinary care to avoid accidents to travelers passing along the sidewalk, but was not bound to anticipate unusual and unforeseen accidents which a reasonably prudent person, with knowledge of all the facts which defendant knew, or in the exercise of ordinary care should have known at that time, would not have foreseen or provided against; and that, if the jury should find from the evidence that the blowing of the witness Kennedy from the building, under all the circumstances then existing, of which defendant as a reasonably prudent person knew, or should have known, was an unusual and unforeseen occurrence, and such as reasonable and ordinary care, with such knowledge as the defendant had, or should have had, in regard to the conditions and circumstances then and there existing, could not reasonably have prevented or provided against, then and in such case you should find that the defendant was not guilty of negligence in failing to build a shed or provide other protection which would have prevented Kennedy from falling upon deceased, etc. This instruction is objectionable in some respects, but it is favorable to defendant. It is the law of the case because defendant does not complain of it, and plaintiff has not appealed as to this defendant.

Under the record, we are of opinion that it was for the jury whether the injury to deceased was an accident, or

whether it was the result of negligence of the defendant.

4. NEGLIGENCE:
contributory
per se: facts
not constitut-
ing.

And it was also a jury question whether, under all the facts shown as to this defendant, and under other instructions, of which no complaint is made, the failure of defendant to cover, guard or warn was the proximate cause of the injury to deceased. Whether the deceased was guilty of contributory negligence was also a question for the jury. It is true deceased, in passing on the sidewalk, could see evidences that building operations were going on, but the barriers which had been extended across the sidewalk had been removed, so that there was at least an implied invitation to use the walk. He may have concluded from appearances that the building was nearing completion, or substantially completed, and may have concluded that there was no danger. He doubtless should have known the wind was blowing, but he had no means of knowing all the conditions and circumstances. It was also a question for the jury whether the barriers which were replaced or changed about the first of September were suitable and sufficient.

5. The defendant requested an instruction to the effect that if the superintendent of streets ordered and directed the defendant to remove the barriers which were first placed in front of the building and open up a portion of the sidewalk to the traveling public, and that defendant constructed other barriers which were still there at the time of the accident complained of, then the jury should find the defendant was not guilty of negligence and return a verdict for the defendant.

5. NEGLIGENCE:
barriers on
streets: re-
moval on or-
ders of city:
effect on build-
er's liability.

This defendant knew the conditions existing at the time, or should have known, but it is not shown that MacVicar, or any officer of the city, had any knowledge or notice of the actual conditions. When the order was made, defendant did not inform MacVicar that work was to be done such as Kennedy was doing. This defendant made no protest or objec-

tion that it would be unsafe to remove the old barriers. If the request, or order, of MacVicar was made upon imperfect knowledge of the real conditions, we think this defendant, having such knowledge, and of the danger to persons using the walk below if its workmen should fall or be thrown from the building, would not be required to comply with the request, if by so doing it would be liable to damages.

Furthermore, conceding, for the sake of argument, that the order of MacVicar was an improper one, it would not relieve this defendant of its duty to exercise the care required for the protection of persons below.

6. It is contended by defendant that its employee, Kennedy, was caused to fall from the building by reason of the high wind then prevailing, and that the injury was caused by the act of God, for which defendant is not liable.

6. NEGLIGENCE: act of God: when no protection. The witness Kennedy gave his estimate that the wind was blowing forty miles an hour, but it is not shown that this was extraordinary or was such as might not be expected at that time of year and at Des Moines. The jury must have found, and we think they were justified in so finding, from the evidence that the defendant was guilty of negligence. Such negligence concurring as a contributing cause with the high wind would not excuse the defendant, but it would still be liable.

The right of defendant to use the street for building operations, and some of the other questions argued, have been before referred to. We have noticed all points that seem to be controlling, and we conclude that no prejudicial error appears. The judgment as to this defendant is affirmed.

Affirmed on both appeals.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

J. G. MELSON, Appellant, v. A. S. ORMSBY, Appellee.

COVENANTS: Deeds—Building Restrictions—Strict Enforcement—

- 1 **Substantial Performance—Discretion of Court.** He who inserts restrictive building covenants in his deed must bear in mind that, while equity will enjoin a violation in a proper case, (a) the exercise of such power, where strict enforcement is demanded, lies within the sound discretion of the court, (b) the court will look beyond the literal terms of the deed for the real object of the parties, (c) will consider for whose benefit such restrictions were inserted in the deed, (d) will consider whether the original object has been practically or wholly abandoned, and if not, whether a substantial performance will not effectuate the object as well as the proverbial "pound of flesh." He must expect the restrictive terms to be most strongly construed against himself. Loose and incomplete terms will not give him his strict enforcement. Finally, he will not be favored with strict enforcement unless it is necessary, to effect the real purposes of the parties.

PRINCIPLE APPLIED: Plaintiff sold a lot to defendant, the deed providing that "the top of the first floor of the building should not be more than four feet above the established grade line of the sidewalk." No sidewalk had been built or grade line established at this time, except for a short stretch of five feet. Later, the sidewalk was completed at grade. Still later, defendant started to build his house. Work of a permanent nature was done. The basement was fitted with a hot water heating plant, connected with divers parts of the house. The lot in question slanted to the west—the topography was not uniform. In some places the first floor was much less than four feet above the sidewalk; in other places considerably more than four feet. The average elevation was less than four feet. Plaintiff had sold several other lots adjoining or near to defendant's lot with substantially the same restrictions, and such owners had violated the restrictions as to height of first floor. They made no complaint of defendant's technical violation and apparently plaintiff did not, though he denied consenting thereto. Some of these violators built their houses after the deed to defendant. The deed contained no provision fixing the point of measurement. *Held* that plaintiff had practically abandoned his scheme, defendant had at least substantially complied with the restrictions, and plaintiff's demand for strict performance should be refused.

TRIAL: Equity Cause—Court Viewing Premises—Applying Evidence.

2 Error cannot be predicated on the fact that in the trial of an equity cause the court, by consent of both parties, viewed the premises, it not appearing that the court in such viewing of the premises did more than apply the evidence.

Appeal from Cerro Gordo District Court.—HON. M. F.
EDWARDS, Judge.

WEDNESDAY, MARCH 17, 1915.

PROCEEDINGS by way of injunction to restrain defendant from erecting a house in excess of a limitation in height fixed in his deed, the covenant in the deed providing that the first floor of the house shall not be more than four feet above the established grade line of the sidewalk. Decree from the defendant, dismissing plaintiff's petition. *Affirmed.*

Senneff, Bliss & Witwer, for appellant.

F. A. Ontjes, for appellee.

GAYNOR, J.—This is an action in equity to restrain the defendant from constructing a dwelling house on Lot 12, in Block 2, River Heights, Mason City, Iowa, in violation of the conditions and restrictions contained in a certain deed made by the plaintiff to the defendant, on the 28th day of April, 1911. This is the restriction: "The top of the first floor of the building must not be more than four feet above the established grade line of the sidewalk."

Plaintiff asks that defendant be required to so alter or change the construction of his dwelling house that the same, when completed, shall conform to this condition and restriction.

The plaintiff, as a basis for this prayer, alleges that on the 28th day of April, 1911, he conveyed said Lot 12 to the defendant, under a proper instrument of conveyance; that the instrument of conveyance or deed contained the above restriction; that the lot conveyed faces on River Heights

Boulevard; that on this street, there are other lots occupied by others and held under deeds containing similar conditions and restrictions; that the other owners purchasing from this plaintiff have complied with the restrictions; that the plaintiff is now constructing a residence on the land immediately across the street from this Lot 12, so purchased by him from the plaintiff.

During the month of June, 1912, and after this conveyance of Lot 12 to defendant, there was constructed on River Heights Boulevard, in front of this Lot 12, a permanent sidewalk, laid on the grade given and fixed by the city engineer. On the 25th day of September, 1912, the city of Mason City passed an ordinance fixing a permanent grade line for sidewalks, practically at the place at which the sidewalk was built. After said sidewalk was put in, but before the ordinance was passed, fixing a permanent grade line for sidewalks at this point, the defendant began the erection and construction of a dwelling house on his lot facing River Heights Boulevard, with the front line of the dwelling house twenty-four feet from the inner line of the sidewalk, and the first floor at an elevation exceeding four feet above the grade line of the walk fixed as aforesaid; that this was a violation of the conditions of the deed.

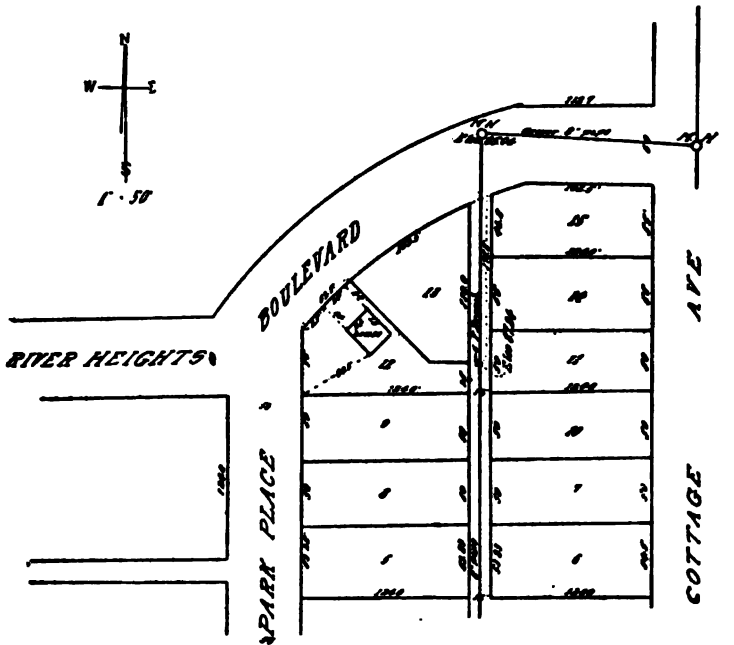
Defendant's answer is practically a general denial, except that he admits the execution of the deed with the condition or restriction therein contained.

We attach hereto a plat of that portion of the property in controversy, which shows the location of Lot 12 now in dispute, the streets abutting thereon, and the location of the house.

So far as the controversy here is involved, there is no dispute in the facts, or practically none.

The house faces on River Heights Boulevard. With reference to the points of the compass, the house faces northwest. In speaking of it hereafter, we will speak of it as if facing north, with the rear end to the south. The northeast

corner of the lot is 5 ft. 7½ in. above the sidewalk as laid. The northwest corner of the lot is 2 ft. 11 in. above the sidewalk, showing that the lot slopes to the west and showing that there is a difference in elevation of 2 ft. 8 in. between the northeast corner and the northwest corner of the lot. At a point opposite the northeast corner of the house, in a straight line to the sidewalk, the elevation above the sidewalk is 5 ft.



4½ in. A point opposite the northwest corner of the house in a straight line with the sidewalk is 4 ft. 3½ in., showing a difference in elevation between the northeast corner of the house and the northwest corner of the house of 1 ft. 1 in. There is a difference in elevation between the northwest corner and the southwest corner of the lot of 1 ft. ½ in.

In speaking of these elevations, we have reference to the first floor of the house. The house was constructed about five or six feet from the east line. That would be the west line of

Lot 13. The difference between the elevation of the floor of the house and that of the average grade of the sidewalk around Lot 12 is 3 ft. 5 in. The top of the first floor is approximately two feet higher than the top of the sidewalk, five feet north of the southwest corner of Lot 12. The floor of the house is approximately 4 ft. 11 in. above a point on the sidewalk on a line drawn directly through the middle of the house.

At the time defendant purchased this lot there was no sidewalk in front of it. There was, however, a sidewalk on the east side of what is shown on the plat as Park Place Street up to Lot 12, and extending about five feet over in front of Lot 12. This sidewalk was then at grade. The floor of the house is 1 ft. 11 in. above this five feet of sidewalk at the southwest corner of Lot 12.

The sidewalk in front of Lot 12 was built about the 18th day of June, 1912. The city engineer gave the builder of the sidewalk the grades at all points, and it was practically constructed at the grades fixed by him. This Lot 12 faces both on River Heights Boulevard and on Park Place Street. It has fifty-three and one-half feet frontage on the boulevard and fifty feet frontage on Park Place Street. The square in the plat, herein set out, represents the position of the foundation of the house,—that is, the main part of the house without the porches.

The house in question was built for the defendant by one Steinberg. The construction of the house was started the latter part of July. The carpenter work was started about the 12th of August. The basement of the house is about 7 ft. 2 in. below the joists of the first floor. There is a hot water heating plant in the building. The pipes pass from the furnace leading to different parts of the house. The boiler is located near the center of the building in the basement. The pipes come out of the top of the boiler and run across under the floor within a few inches of the joists. These are four-inch pipes.

Steinberg testified that he commenced the carpenter work

on the house on the 12th day of August. On the 17th of August, he stopped work because there was notice served that there would be an injunction asking a change in the height of the foundation of the house. He started work again on the 28th day of August. Work of a permanent nature, such as might interfere with the lowering of the house, was started about October 10th.

The first proposition relied upon by the plaintiff involves the right to maintain an action of this sort in equity. Of this, there can be no serious controversy. As said by the Massachusetts court in *Codman v. Bradley*,

1. COVENANTS:
deeds: building restrictions: strict enforcement: substantial performance: discretion of court.

87 N. E. 593, in speaking of a condition similar to the one here under consideration: "It created a right enforceable in equity against all persons taking with notice of it, actual or constructive, and this equitable right is in the

nature of an easement, even if it rests on no broader principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it."

In Pomeroy Equity Jurisprudence, Vol. 4, 3d Ed., at Sec. 1341, we find the following: "An injunction restraining the breach of a contract is a negative specific enforcement of that contract. . . . Where the agreement stipulates that certain acts shall not be done, an injunction preventing the commission of those acts is evidently the only mode of enforcement. . . . A clearer notion of the doctrine will perhaps be obtained by considering the contracts to which it applies, in three main classes", among which we find cited those restrictive covenants which create equitable easements.

In Sec. 1342 of the same work, the author says: "The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of the damages, and even the fact that the plaintiff has sustained any pecuniary damage, are wholly immaterial. In the words of one of the ablest of modern equity judges 'it is clearly established by authority that there is sufficient to justify the

court in interfering, if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described', namely, an injunction."

See also Devlin on Real Estate, Vol. 2, 3d Ed., Sec. 990-e, in which it is said: "Frequently an owner of a tract of land who desires to cut it up into lots for building purposes, inserts in the deeds of sale building restrictions as a part of a general plan for the improvement of the whole tract. When uniform restrictions as to the purposes for which the lots may be used are inserted in the deeds, these provisions inure to the benefit of the several grantees. . . . It is, however, essential to ascertain the purpose of the grantor in the imposition of these restrictions. They may be made for his own personal benefit, or they may have been imposed for the benefit generally of purchasers of the lots; and the grantor's intention may be ascertained from his act and the circumstances."

Supporting this, see *Wesley v. Sulzer* (Pa.), 73 Atlantic 338; *Watrous v. Allen* (Mich.), 24 N. W. 104; *Spilling v. Hutcheson* (Va.), 68 S. E. 250; *Hyman v. Tash* (N. J.), 71 Atlantic 742; *Ogontz L. & I. Co. v. Johnson* (Pa.), 31 Atlantic 1008; *Sharp v. Ropes*, 110 Mass. 381, 385; *Swan v. B. C. R. & N. Ry.*, 72 Iowa 650; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. D. 632.

In construing conditions or restrictions in a deed, such as are here under consideration, it is important to determine the intention of the parties in making the restrictions, and the object and purpose to be attained by their enforcement. Courts of equity, in enforcing restrictions of this sort, will look to the purpose intended to be accomplished by the enforcement, as the same appears to have been in the minds of the parties

at the time of the making of the restriction. It might, and often does happen, that a restriction of this character, though properly made and ordinarily entitled to recognition and enforcement in a court of equity, if enforced, accomplishes only the fulfilment of an idle dream entertained at the time, but subsequently abandoned; that its enforcement at the time of the commencement of the suit would not aid in the carrying out of any purpose or scheme entertained at the time of its making. The scheme to be accomplished, by the enforcement of the provisions, may have been abandoned, or it may be that the enforcement of the provisions would not tend to the accomplishment of the scheme or purpose originally entertained. It may be that an exact adherence to the strict requirements of the condition or restriction is not necessary to the accomplishment of the scheme or purpose to effectuate which the provision was inserted. Equity looks not to the exact letter of the contract, but to the spirit and purpose of it, and it may be that a substantial compliance with the conditions or restrictions makes effectual the purpose and scheme originally entertained. Where a strict performance of the conditions is sought, the language of the restriction should be such as to enable the court to say that a strict performance was intended.

And further, before a strict literal performance of the restriction will be exacted by a court of equity, it must affirmatively appear that this is necessary to effectuate the purpose, scheme, or intent of the parties in making the restriction, and where the purpose and intent of the parties is made effectual by a substantial compliance with the restriction, such a compliance will satisfy the requirements of those rules of equity upon which the right to enforce compliance is based. Courts of equity will not strictly enforce, according to the letter, mere naked legal rights against a party who has substantially performed the conditions, and, in so doing, has made effectual the scheme and purpose and intent to be accomplished through the instrumentality of the restrictions and conditions.

Therefore, courts of equity have recognized the necessity of looking beyond the mere printed restriction, to the parties themselves; the subject-matter of the restriction; the conditions, as they exist, surrounding the subject-matter of the restriction; the topography of the country surrounding the place affected by the restriction; the scheme and purpose to accomplish which the restriction was made; and this, in order to ascertain the intent of the parties in respect to the property conveyed.

We therefore turn to the record in this case, with these rules in mind, to ascertain what the situation was at the time of the making of this deed, and at the time plaintiff sought to enforce this restrictive provision.

We find that at the time this deed was made, a sidewalk grade line had not been established on the side of this property abutting on River Heights Boulevard, nor, so far as this property is concerned, upon the west side abutting on Park Place Street. It does appear, however, that a grade line had been established and a permanent sidewalk put in on Park Place Street in front of Lots 8 and 9, and extending north over in front of Lot 12, a distance of about five feet.

It appears that the floor of this house, at the southwest corner of Lot 12, was but 1 ft. 11 in. above the sidewalk at that point; that at the northwest corner of Lot 12, the floor of the building was but 2 ft. 11½ in. above the sidewalk; that at the northeast corner it was 5 ft. 7½ in. above the sidewalk; that the floor of the house was above the sidewalk, at the northwest corner of the house, 4 ft. 3½ in.; that the floor of the house was above the sidewalk at the northeast corner of the house 5 ft. 4½ in. Proceeding eastward upon the street running in front of the house, up to and in front of Lot 13, we find a building constructed, the deed containing substantially the same provision as this, and there we find the first floor of the building 5 ft. 3¾ in. higher than the grade opposite the front door of the house. Proceeding southward in front of Lot 9, we find a building constructed with substan-

tially the same restrictions, with the first floor of the house 3 ft. 5 in. higher than the sidewalk opposite. We find a house also on Lot 12, in Block 1, with the top floor 6 ft. above the sidewalk in front. In the next house to that, the first floor is 4 ft. 7½ in. above the sidewalk opposite. In the next house west, the first floor is 4 ft. 6 in. above the sidewalk opposite. In the next house west, the first floor is 5 ft. 10 in. above the sidewalk opposite. In the next house west, the first floor is 5 ft. 1 in. above the sidewalk opposite. These houses are built on River Heights Boulevard and west of Park Place, and on the south side of River Heights Boulevard, facing to the west.

The first house, above mentioned, is on the corner of River Heights Boulevard and Park Place Street, and directly opposite the defendant's house. The height of these houses was known to the plaintiff at the time he made his deed to the defendant, and he knew approximately the elevation of the floors of these houses. It appears that the elevation, at the time this trial was had, was the same as at the time the deed was made. It is true that the plaintiff denies that he consented to the erection of these buildings above the floor line required in the deed, but it appears that they are there, and they either do or do not offend the eye. They either do or do not destroy the beauty and symmetry and attractiveness contemplated by the plaintiff's scheme. It does not appear that any effort has been made on his part to compel these parties to comply with the requirements of the deed in this respect. It is also true that he claims that some of the buildings are so constructed that the eye could not observe the location of the floor. This, however, might become apparent from the location of the porches and the steps approaching. It would seem that the plaintiff had abandoned any thought of beautifying the residence district through this method, and if so, the sole accomplishment of his purpose is to find full fruition in compelling this defendant to strictly comply with the restriction. Some of the houses, heretofore referred to,

with excessive elevation, have been constructed since the making of this deed.

The purpose of requiring this restriction in deeds is set out by the plaintiff in his petition in which he says that he was the owner of certain land and caused the same to be duly platted as an addition to the city of Mason City, and known as River Heights; that since said platting, and for the purpose of making and keeping said addition an attractive and beautiful residence district, he inserted in all conveyances of lots in said addition, the same conditions and restrictions substantially as contained in this deed.

It is apparent, therefore, that the plaintiff, in neglecting to insist upon a strict compliance with the conditions of the deeds, has abandoned his original intention to beautify and make attractive, by this method; has abandoned his general scheme adopted for this purpose. It is apparent from the general situation there—the elevations and depressions—a strict compliance with the condition would not be effectual to accomplish the purpose intended.

In construing conditions of this character, they are to be most strongly construed against the party seeking to exact their performance, and if any doubt exists as to the manner of the performance, if the instrument leaves it in doubt, as to the points from which the measurements are to be made, the restriction shall be construed most favorably to the one against whom it is to be enforced. The object of the restriction contained in the deed evidently was to keep dwelling houses erected on this lot, when completed, in harmony with the other dwellings on the street; not to mar and injuriously affect the beauty of the street for residential purposes.

At the time this contract was made, there was an established grade line for sidewalks on Park Place Street, and a portion of a permanent sidewalk laid in front of this lot on the west. The provision of the deed is "The top of the first floor of the building must not be more than four feet above the established grade of the sidewalk." There is no provision

in the deed fixing the points of measurement immediately in front of the house. If you take a point directly in front of the house on the north on River Heights Boulevard, the floor is more than four feet above the sidewalk. Take it in front of the house on Park Place Street, it is less than four feet. Taking the average height of the sidewalk on the north and west sides of the lot, the floor is less than four feet above the sidewalk. If there is any doubt as to the point from which the measurement should be taken, that doubt must be resolved in favor of the defendant. See *Van Duyn v. Chase & Co.*, 149 Iowa 222; *Johnson v. Robertson*, 156 Iowa 64.

Again, it has been the holding of this court that specific performance of a building restriction covenant rests largely in the sound discretion of the court, and relief will be denied if the defendant will be subjected to greater hardship or the consequences would be inequitable, but pecuniary loss to defendant will not itself alone prevent enforcement.

The covenant evidently was not made for the sole benefit of the plaintiff in this case. It was made for the benefit of those who purchased lots from the plaintiff upon these streets. These purchasers have not complied with the restrictions in their deeds. They are not in a position to complain of the defendant, nor are they complaining. Nor have they urged any objections to the manner in which defendant constructed his house. The plaintiff cannot complain because the dream of beauty and attractiveness that moved him to act and to insert these conditions in the deed has not been realized, when it is apparent that he is now not interested in the realization. But, even if we should concede that he may now insist on enforcing against this defendant a claim resting upon a breach of this covenant, we do not think, from this record, that the complaint rests upon a substantial foundation. Taking into consideration the elevation at which these other houses were constructed, the sloping grade line of the lot on each side of this Lot 12, we do think that a strict enforcement of the restriction would not tend to fulfill this dream

of beauty more substantially than it is now fulfilled under present conditions. It would require a critical eye and a careful study of the situation, in view of these facts,—in fact, it would almost require a measurement by rule,—to ascertain that at any particular point, the floor of this house had an elevation greater than is required by the restriction. We think that there is a substantial compliance with the restriction in the deed, and that plaintiff has no equitable ground of complaint. We agree with the ruling of the learned District Court in the disposition he made of this case.

There is another point urged for reversal, to wit, that the court inspected the *locus in quo* before he rendered his decision, and it is claimed that he took into consideration

2. **TRIAL:** equity cause: court viewing premises: applying evidence. what he observed in arriving at his final conclusion. This point is not argued, but we have examined the record and find that the view was taken by consent of both parties, and we do not find that the court used any fact obtained by his observation in determining the case, but rather used it as an aid to a better understanding of the situation as developed in the record.

Upon the whole record, we find that this case ought to be and is *Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur

W. T. MORROW et al, Appellees, v. MARY E. HALL, Appellant.

BOUNDARIES: Acquiescence—Adverse Possession—Pleading. One

- 1 who pleads that a certain line is the true boundary line between tracts of land because recognized and acquiesced in for the statutory period of ten years must stand or fall on that theory. After failing to establish acquiescence, he will not be permitted to prevail on the claim of adverse possession only.

COSTS: Apportionment—Equitableness—Presumption. An appor-

- 2 tionment of costs will be presumed just and equitable unless the record on appeal shows the contrary.

APPEAL AND ERROR: Trial to Court—Belated Ruling on Evidence.

3 Even though the court, in a trial to itself, did commit error in receiving evidence, the error was cured by subsequent ruling excluding such evidence.

APPEAL AND ERROR: Judgments in Other Cases—Necessity for

4 Inclusion in Appeal Record. Manifestly this court on appeal cannot give consideration to some other judgment in some other case unless the same is embodied in the appeal record.

Appeal from Davis District Court.—HON. FRANCIS M.
HUNTER, Judge.

WEDNESDAY, MARCH 17, 1915.

ACTION at law to determine a controversy over a division fence. Trial to the court without a jury. Judgment and decree for plaintiffs. Defendant appeals. *Affirmed.*

Payne & Goodson, for appellant.

T. P. Bence and *C. W. Ramseyer*, for appellees.

PRESTON, J.—1. Plaintiffs own the $W\frac{1}{2}$ $NE\frac{1}{4}$ $SE\frac{1}{4}$, with other lands. One Feagins owns the twenty acres east of it. Defendant owns the $SE\frac{1}{4}$ $SE\frac{1}{4}$.

Plaintiffs allege that defendant is the owner of, and by mutual agreement bound to keep up, the east half of the fence between said tracts, and the plaintiffs the west half; the plaintiffs and defendant have owned said tracts of land more than ten years last past; and that the line of fence between said tracts has been marked by the line of an old rail fence for forty or fifty years, and is the true line between said tracts; and said fence was repaired and kept up by the respective owners ever since said rail fence was built, until about the fall of 1902, the defendant erected a wire fence about eight or ten feet north of the line of said old rail fence, and insists on said wire fence being the true line; that the line of the old rail fence between said tracts of land has been recognized and acquiesced in by the respective owners for more than

ten years, and is the true line between said tracts of land; that said defendant refuses to remove her said wire fence, and refuses longer to recognize the line of the old rail fence as the true boundary. They ask that the line as alleged by them be decreed to be the true line.

Defendant says that the said tracts of land have been separated by a post and wire fence on the same line as that of the present fence of the defendant, which line extended on west from defendant's fence, and the fence of the defendant, and the line extending west from the same is the true line between said tracts, and the same has been recognized and acquiesced in as the true boundary line between the said farms by both plaintiffs and defendant, and plaintiffs' grantor, for more than ten years last past, and the same is the true and lawful boundary line between said tracts; and defendant says that plaintiffs have recently set their fence, which is the west half, some six or eight feet south of the line where it was formerly located, which former location was on a line with defendant's fence; and defendant says that her fence is on the true line and the plaintiffs' fence is not; neither has plaintiffs' fence been recognized as the boundary for ten years.

Both parties claim their wire fences are on the line of the old rail fence. The question is, which party had their wire fence on the line of the old rail fence built by one Small, father of the defendant, and Feagins, the father of one of plaintiffs, and to determine the true line in which both acquiesced.

It is a question of fact. There were quite a large number of witnesses and the evidence was conflicting. The cause is not triable *de novo*. The weight to be given to the findings of the trial court, under such circumstances, is well understood and has been settled by many decisions, as well as by the statute. We are ourselves satisfied, from a reading of the record, that the conclusions of the trial court are correct, and sustained by the evidence.

The findings were specific and we shall set out only so

much thereof as seem to be important and controlling. In making his findings, the trial court used a plat which had been introduced in evidence. The court found that:

"Harrison Feagins was the owner of the entire Northeast Quarter of the Southeast Quarter for many years up to October 2nd, 1899, when he sold the West One Half to the plaintiff, W. T. Morrow, and executed to him a deed therefor, and about six years ago W. T. Morrow deeded said land to his wife, Lida A. Morrow, plaintiff.

"Mr. Small, father of the defendant, owned the land now owned by the defendant, for many years and to the time of his death, and the defendant purchased it in 1896 from the referees appointed to distribute his property.

"That after the defendant became the owner of her land, and before the plaintiffs became the owners of their lands, the defendant and said Feagins entered into a mutual agreement relative to the fences between said lands and thereunder, Feagins was to keep up the west twenty rods and she, the defendant, the east twenty rods thereof, and such arrangement prevails to this time between the parties plaintiff and defendant."

Forty-four years ago, Feagins, who then owned the northeast quarter of said quarter section, and Mr. Small, who then owned the southeast quarter of said quarter section, had a survey made of the boundary line between them from point "O" to point "E" on the plat ("O" is at the northwest corner and "E" the northeast corner of the southeast southeast) and during the same year built a rail fence approximately along the surveyed line, intending to place it on the exact boundary line between said points. By mutual agreement, Feagins constructed and owned the west forty rods, or west half, of said fence, and constructed a rail fence so that the south corners of the worm of the fence rested upon the surveyed line; and Small erected and owned the east forty rods, and constructed his rail fence so that the north corners

of the worm rested upon the surveyed line. The worm of the rail fences was four and a half feet in width. Both of said parties recognized the boundary line to be along the south corners of the west forty rods and along the north corners of the east forty rods of the two worms of said fences, and acquiesced therein from the time said line was run and fences built to the death of said Small, and to the sale of above land to the plaintiffs; and at the time the plaintiffs purchased their land, and many years prior thereto, they had knowledge of said rail fence and of the fact that it had been recognized and acquiesced in as the true boundary line in the manner above set forth, and for many years prior to the time defendant purchased her said land; and at the time, she had knowledge of said rail fence, and the fact that it had been recognized and acquiesced in by her father and Feagins as the true boundary line between said tracts of land, in the manner above set forth.

That the defendant built a new wire fence along the east twenty rods between her land and the land of the plaintiffs, which was constructed in 1899, and claims that it was constructed on the line of the north corners of the worm of the old rail fence, and further claims that her said wire fence is on the true line between said lands.

The court did not find, but the undisputed evidence shows, that this fence was reset about 1910, and it is the claim of the defendant that it was on the line of her first wire fence.

The court further found that plaintiffs constructed a wire fence in 1910, which they claim was constructed immediately north of the center of the worm of the old rail fence, and claim that their wire fence stands about two and a half feet north of the old surveyed line and of the south corners of the worm of the old rail fence. That the old rail fence remained where originally constructed along the east twenty rods, until the defendant built her fence, when that portion of it disappeared, and remained there along the west twenty rods until the plaintiffs built their fence, when it disappeared.

That extending defendant's fence west, and on that line west to the west side of plaintiff's land, and extending the plaintiff's fence east, and on east to the east side of plaintiff's land, would leave a space between the two fences approximately ten feet in width.

"I do not find that Feagins, at the time the defendant built her said wire fence, agreed with the defendant that the line where it was placed, was the true boundary line between his said lands and the land of the defendant, or that he ever recognized or acquiesced in that line, as being the true boundary line, or during any of the entire time that the plaintiffs, after they became the owner of their said land recognized or acquiesced in that line as being the true boundary line. On the other hand, they never did recognize or acquiesce in it. The defendant has never recognized or acquiesced in the line where the plaintiffs built their wire fence, as the true boundary line between their said lands.

"The true boundary line between the lands of the parties plaintiff and the defendant, extending the full forty rods, is at the south corners of the worm of the old rail fence, excepting at the point where the small ravine crosses said land at about "F" to "J," and at that point it is straight from the main body of the south corners of the worm of the old rail fence east of there, to the south corners of the main body of the worm of the old rail fence, west of there.

"The plaintiffs are not claiming that the boundary line is south of the south corners of the worm of the old rail fence, and if their wire fence is south of it, then they are not entitled to maintain it where it is.

"The defendant in her evidence, says that all she wants is the land belonging to her. If her wire fence is north of the south corners of the worm of the old rail fence, then her wire fence is north of the true boundary line, and she is not entitled to the intervening strip of ground by reason of any of the claims made in her answer."

A decree was entered, and a surveyor was appointed to

locate the south corners of the worm of the old rail fence between said tracts of land. This was done and the commissioner made his report, accompanied by a plat; and the report was approved. There was no objection to the appointment of the commissioner, or to his report.

What we have said as to the conclusiveness of the findings of the trial court disposes of the principal point in the case.

It should be said that at about the time Feagins sold the twenty acres to Morrow an arrangement was made by which the parties "swapped" fences, as defendant puts it; which gave plaintiffs the west twenty rods of fence, Feagins the east twenty rods, and defendant the forty rods together in the center.

2. The trial court found that defendant constructed her wire fence in 1899. Plaintiffs contended that it was built in 1902. Appellant states that she does not appeal from that

1. **BOUNDARIES:** part of the decree so finding that her fence
acquiescence: was constructed in 1899. There was a sharp
adverse possession: conflict in the evidence at this point. It is
sion: pleading. now contended by appellant that, by reason of her having built her fence in 1899, the claim of plaintiff is barred by the statute of limitations because of adverse possession. But that alone is not sufficient. Defendant did not plead or rely upon the statute of limitations upon any other theory than that of recognition and acquiescence. The evidence was directed to proof of that fact, and that was the theory of the trial. The trial court found that while defendant's wire fence was constructed in 1899, yet there was no agreement that such was the true line, or that it was so recognized or acquiesced in. The finding is supported by the evidence.

3. The court taxed to defendant all costs except \$30.00, which was taxed to plaintiffs. The record does not disclose the reason for this. Appellees claim that all the costs should have been taxed to defendant, because plaintiffs were successful; but they have not appealed. Some additional costs were made on the question as to whether the wire fence of defendant was

2. **COSTS:** appor-
tionment:
equitableness:
presumption.

erected in 1899 or 1902. The inference is that because of this, and the finding in favor of defendant at this point, the court apportioned the costs. Appellant does not complain that they were apportioned, but claims that the court should have made a more just and fair division. There were a few witnesses called on that point alone; others testified upon that and other matters. The fee bill is not in the record, and we do not know how many days the witnesses were in attendance, or the number of miles traveled by them. We are not as well able to determine that question as the trial court.

4. Over the objection of defendant, one of the plaintiffs was permitted to testify that he did not at any time recognize the wire fence of defendant as being on the line. There was also a motion to strike the answer, which was not at the time ruled upon; but later, and during the trial, while the same witness was on the stand, the motion to strike was sustained. This assignment of error should not have been made.

5. It appears that there is another action pending between Feagins and defendant as to their part of the fence. It seems to us that these controversies could have been determined in one action, under the statute providing for the establishment of disputed corners and boundaries, but that question is not raised, hence it is not determined. But it is argued by defendant, and it has been assigned as error, that another judge determined the other case in favor of this defendant, and that the issues and evidence in both cases are the same. It seems, however, that a petition for a new trial was filed in that case, and from the ruling in that matter an appeal has been taken to this court. The other case was tried first. Possibly the petition for new trial was based upon a claim of newly discovered evidence which was developed on the trial of this case. Manifestly, it would not be proper for us to refer to the record in another case,

3. APPEAL AND
ERROR: trial
to court; be-
lated ruling on
evidence.

4. APPEAL AND
ERROR: judg-
ments in other
cases: neces-
sity for inclu-
sion in appeal
record.

which is no part of this case, for the purpose of determining the questions arising on the appeal of the instant case.

We discover no error and the judgment is—*Affirmed*.

LADD, C. J., EVANS and WEAVER, JJ., concur.

WILLIAM G. MURPHY, Appellant, v. ALBANY PECAN DEVELOPMENT COMPANY et al., Appellees.

PROCESS: Service—Nonresident—Foreign Corporation—Jurisdiction Over—"Agency." (A) Jurisdiction of a foreign corporation may be obtained by service (a) upon any general agent of such corporation or (b) upon any other agent or person transacting the business thereof in the county where the action is brought. (Sec. 3529, Sup. Code, 1913.)

(B) When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. (Sec. 3532, Code.)

PRINCIPLE APPLIED: Plaintiff brought action against two foreign corporations and one nonresident to cancel a land development contract. These defendants constituted one concern, or at least were acting together. Service was made in this state on one Wright, on the claim that he was defendants' agent. Evidence showed he had taken applications or contracts, sent them to defendants for approval and received commission for so doing, though the defendants paid no part of his office expenses. He received some payments on contracts. Wright was so engaged for some two or three years. During this time, one of the defendants, in response to inquiry, wired that Wright was its agent to sell, subject to the defendant's approval as to terms of contract.

(a) *Held*, Wright was agent of the individual nonresident defendant within Sec. 3532, Code.

(b) *Held*, Wright was agent of the foreign corporations defendants within both Sec. 3532, Code, and Sec. 3529, Sup. Code, 1913, and jurisdiction was acquired by the service.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

WEDNESDAY, MARCH 17, 1915.

ACTION to have contract rescinded on grounds of breach of same and fraud, and for damages. Defendants, other than John L. Wright, appear specially and move to quash the return and service of notice on non-resident defendants. The motion was sustained. Plaintiff appeals.—*Reversed*.

C. N. Pickler, for appellant.

Müller & Wallingford and *Oliver H. Miller*, for appellees.

PRESTON, J.—The three defendants named in the caption, other than John L. Wright, are non-residents of Iowa. Two of them are corporations. Service was had upon them by serving John L. Wright as their agent. The issues were as to whether proper service was made upon John L. Wright as agent to acquire jurisdiction of the appellees. Appellees' motion was supported by affidavits, as was plaintiff's resistance thereto, and both parties offered evidence of witnesses in court.

The grounds of the motion are, in substance, that the first two named defendants are non-resident corporations and the other defendant is a non-resident; that they neither individually nor collectively have any officer or agent within the county of Polk and state of Iowa, and that no agency is maintained by any of them in said county; that John L. Wright is not in the employ of any of the defendants; that he is, so far as is known to the defendants, an independent broker and has acted as such in all transactions which are referred to in the petition. The affidavit of John L. Wright, made a part of the motion, states that he is not the agent of any of his co-defendants; that he is not in the employ of any of said co-defendants, and that he has been given no authority to represent them or their business within the state of Iowa; that they do not contribute to any of his office expenses; and

1. PROCESS:
service: non-
resident: for-
eign corpora-
tion: jurisdic-
tion over:
"agency."

that the only transaction he has ever had with them is that of an independent broker. He testified as a witness:

"I know Mr. Murphy. My individual transactions with him, I can't remember. I don't know what my personal transactions were. I talked with him a little I know, but what transactions there were I can't say. I took application Exhibit 'A,' a contract, and forwarded it to the Company. As compensation for taking these applications they paid me a commission. We had a verbal arrangement, if I obtained any contract for development or procured a prospect of sale of any of this Pecan Development Company in Florida I was to receive a commission. I received the application and forwarded it to them. I did not make any endorsement on the application at all in the way of approving it. I received nothing as a contribution of any kind from any of these defendants towards the expenses of my office or by way of salary. I never received any compensation on this deal whatever. I do not know whether or not Mr. Murphy has paid any of the payments except the first annual payment; he has not to me. Sometimes some of them have brought checks payable to the company to me to send down. In those instances, payments were made out in the company's name and I received no compensation whatever for sending down this Murphy contract. That arrangement was had at the time the Murphy contract was obtained by the Girardeau Company.

"I was down there the last time in August, this year. My arrangement with the Albany Pecan Development Company is an oral one, somewhat different in detail and compensation than the one with the Girardeau Company; it is all verbal. I never saw, nor had in my possession, the original of an agreement signed by Mr. Murphy on May 28, 1913, and I never saw this copy of it. The Albany Pecan Development Company, and the Girardeau Company, and J. H. Girardeau, Jr., were all non-residents of the state of Iowa. I know M. R. Kennedy. He never left any application with

me for any of these defendant companies. He called on me, but I do not know whether it was with reference to an application or not. I did not send any telegram down there for him and did not receive one. He never bought any land or stock in the development company through me.

CROSS-EXAMINATION.

"I know Mr. Kennedy and have had a conversation with him. He came and asked me if I was agent for the Albany Pecan Company and I told him yes. I probably did fill out this application, I couldn't say whether I did or not, for the chances are I did.

RE-DIRECT-EXAMINATION.

"Mr. Kennedy asked me whether I was agent, and I told him I was in the sense that I sold the land on commission. I might say both of those transactions through this land business was by putting the buyer in touch with the company direct. I handled some, very little went through my personal hands in any way. I told Mr. Kennedy I was agent for this company in the sense I have testified to."

RE-CROSS-EXAMINATION.

Q. "You just told him you was agent?"

A. "I told him I was agent—I can't recall the exact detail."

Q. "You did go into detail?"

A. "We said something in reference to the sale of land. I was agent in the sense of selling the land."

Q. "Mr. Kennedy was in your office twice, he went out and came back with Mr. Murphy; and you told him the second time he was in?"

A. "He asked me about the agency first time, and didn't stay in and he came back with Mr. Murphy, and I attempted to explain."

Plaintiff's application, Exhibit "A", referred to by the witness Wright, is as follows:

APPLICATION FOR DEVELOPMENT.

For five acres, purchased from Columbia Florida Land Company and described as Pt. of S. W. Q. farm No. 66 in Columbia County, State of Florida.

I, the undersigned do hereby apply for the development of five acres of land in Columbia County, State of Florida, which was purchased from Columbia Florida Land Company of St. Louis, Mo., and described as part of the southwest quarter of farm No. 66 of Lake City Farms.

For a contract to fence this property with a stock proof wire fence, clear this land suitable for the best growth of Pecan trees, and to set this orchard with Pecan trees not later than the fall following this application. Trees to be not less than three feet tall and roots not less than two years old. To be of the most approved of the finer paper-shell varieties of budded and grafted pecans and to be set twenty trees to the acre.

The trees to be carefully and thoroughly fertilized, cultivated, pruned, and cared for, according to the best scientific judgment and experience of pecan culture, for a period of sixty months after the trees are set. Any trees that may die at any time from any cause whatever are to be replaced within twelve months with trees of a proportionate larger grade as will keep the grove as near uniform as is practical at all times.

For and in consideration of such services I agree to pay Six Hundred Dollars, \$600.00 as follows: One Hundred Dollars, \$100.00 down and which accompanies this application and One Hundred, \$100.00 on the first of each succeeding year hereafter till this full amount has been paid.

This property and grove is to be held as security for any defaults in payments as above mentioned and any such deferred payments shall bear interest from default at the rate

of ten per centum per annum till paid and the contractor is at liberty to stop all developments after three consecutive defaults in monthly payments by the applicant.

I understand that I am to receive a definite contract covering this development as soon as this application is accepted. Accepted.

J. H. GIRARDEAU, JR., Signed Wm. G. MURPHY,
Expert Pecan Horticulturist, Monticello, Florida.

Witness Kennedy, testifying for plaintiff in resistance to the motion, says that he heard Mr. Wright's testimony as to the conversation by him with witness in Wright's office, and that he gave such conversation substantially correct.

"I authorized this telegram to be sent:

'Des Moines, Iowa, Feb. 3, 1914.

Albany Pecan Development Co.,
Albany, Georgia.

Desire to purchase. Is John L. Wright your authorized agent? Wire me.

MR. KENNEDY,
Cargill Hotel.'

"And this telegram I received from the Albany Pecan Development Company in answer:

'Albany, Ga., Feb. 3, 1914.

Mr. Kennedy, Care Cargill Hotel,
Des Moines, Iowa.

Wright is authorized to sell orchards subject to our approval as to terms of contract.

ALBANY PECAN DEV. CO.'

"I purchased no stock and did not contemplate particularly making one. I did not pay for sending the telegram. Mr. Murphy sent it. He said he wanted to establish the fact that Mr. Wright was agent for this company."

William G. Murphy, plaintiff, testified:

"In the fall of 1910, I think it was, I was interested in

buying a tract of ten acres in the Columbia Land Company's tract at Lake City, Florida. I went to John Wright and he made out this application and sent it to Girardeau, and Girardeau sent back that contract. Mr. Wright called me up over the telephone and said the contract was there, and I went down and took him a check of \$94.00. He forwarded to Mr. Girardeau, and the check was made out to Mr. Girardeau. It went on for a year and I got one or two letters from him saying everything was getting along fine. Mr. Wright said he had been down there and investigated all of the nursery companies of any importance and found Mr. Girardeau was the most reliable; that his father was a nursery man before him, and a man financially able to carry out contracts; in fact, he said Mr. Girardeau was worth over \$100,000.00. Wright said he was a representative of that company. He did not say in what capacity, or what his powers were, but simply the company was reliable and he was agent for them. I paid Wright \$94.00 at the time of taking the application and the next December I paid \$91.00 to Girardeau. The next year it was transferred over to the Albany Pecan Company, and I paid them \$100.00; the last payment was \$100.00, four payments."

CROSS-EXAMINATION.

"I was down in the State of Georgia last January and looked over this proposition of the Albany Pecan Grove Company there. I made the payments direct to the company on this contract and not to Wright. I received the original of the letter, Exhibit '5' attached to my petition. There was a printed slip attached to this Exhibit '5.' I think this is the same slip except at the bottom of it or one part of it, I can't remember, but I think, and my wife says the same thing—she wrote it out—that she wrote that there, 'these trees must now be two years old,' when the fact of the matter was from their own statement when I was down there the

trees were not planted at that time at all. This slip is like the one I signed, only I wrote that on there."

Court: "It is the same except what your wife added to it?"

A. "Yes.

"The first transaction I had with John L. Wright was when I signed the application at that time for development of an orchard. I had no conversation with Mr. Girardeau relative to Mr. Wright's connection with the Girardeau people. I only made the one trip down and that was last January, and at that time the Albany Pecan Development Company was the one that was doing the developing."

It was conceded by appellees on the trial that Mr. Wright is here in Des Moines, with the consent of the Albany Pecan Company, authorized merely to the extent of receiving from anyone who desires to hand them any applications for development, and that he sends those applications down to this company, and if they are approved and paid for, Mr. Wright gets an agreed commission, but otherwise he does not, and they do not contribute in any wise to his office expenses.

It is contended by appellees in argument that the evidence does not show that any payments were made to Wright by plaintiff, but the evidence which we have set out plainly shows that payments were made to Wright.

1. It is largely a question of fact whether the person alleged to be an agent for defendants is such within the meaning of the statute. Where there is a conflict in the evidence, the finding of the trial court will be upheld. In this case there is no substantial conflict in the evidence. Secs. 3529, Code Supplement, 1907, and 3532 of the Code are the ones cited and relied upon. So much of 3529 as applies to this case is as follows:

"If the action is against any corporation or person owning or operating any railway or canal, steamboat or other river craft, or any telegraph, telephone, stage, coach or car

line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county."

That section does not apply in this case to the individual defendant, Girardeau. Under that section, "When the action is against . . . any foreign corporation, service may be made upon any general agent of such corporation . . . or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought."

Sec. 3532 reads: "When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

It is contended by appellees that Wright, who was served with original notice in Polk County, Iowa, as agent of the appellees, was not in the employ of any of the appellees, but was a broker, maintaining his own office and transacting his own business, and they cite the following Iowa cases to sustain their contention: *Younker v. Western Union Telegraph Co.*, 146 Iowa 499; *Bell Jones Co. v. Erie Ry. Co.*, 168 Iowa 96; *Reed v. Racine Boat Co.*, 156 Iowa 12.

In the *Younker* case, the sole question was whether sufficient notice of the claim was given to the telegraph company as provided by Sec. 2164 of the Code, and was not a question as to whether the notice was given to the proper person, but whether it was by the proper person.

In the *Bell Jones Company* case, it was shown that the

agent upon whom notice was served had for several years maintained an office in Davenport, holding himself out and acting as the agent of the Erie Railroad Company and Erie Despatch. The real question in the case turned to a large extent upon the relation existing between the Erie Despatch and the Erie Railroad Company. The service was held sufficient.

In the *Reed* case, the record did not disclose any notice of any kind to the principal defendant of the garnishment, and, without such notice or appearance, the court could not rightly enter a judgment against the garnishee under Code Sec. 3974.

Appellees also cite cases from other states, and under the statutes thereof, that service of process upon a mere traveling salesman, without any office or place of business in the state, or upon a mere soliciting agent, is not sufficient, also the case of lumber merchants who maintained a place of business of their own and were acting on their own account.

A definition of a broker is given in the *Yunker* case, *supra*, and the distinction between a factor or commission merchant and a broker is pointed out. See also 2 Mechem on Agency, Sec. 2497; 4 R. C. L., pp. 242, 243 and 339.

But there are many kinds of brokers. 2 Mechem, Secs. 2363 to 2375; 4 R. C. L., 242, 328 and 330.

Even a broker may not accept commission from both sides without the knowledge of both parties. 4 R. C. L., 328.

An exception to this is where the broker acts merely as a middleman. 4 R. C. L., 330; *Stapp & Hendrick v. Godfrey*, 158 Iowa 376.

A broker's compensation is ordinarily a commission, and there must be an employment either express or implied. 4 R. C. L., pp. 297, 298, 299.

In the instant case, Wright did receive a commission from the defendants. He did not receive any from the plaintiff. Agency, in its broadest sense, includes every relation in which one person acts for or represents another by his author-

ity. In a more restricted sense, it may be defined as the relation which results where one party, called the principal, authorizes another, called the agent, to act for him in business dealings with third persons. 31 Cyc., 1189.

The duty and liability of a broker to his employer are essentially those of an agent required to exercise fidelity and good faith toward his principal in all matters that fall within the sphere of his employment. 4 R. C. L., 269.

The rights of third persons against the principal for the acts and contracts of the broker rest upon the same principles as in other cases of agency. 2 Mechem on Agency, Secs. 2494, 2495.

We think that, under the evidence in this case, John L. Wright was more than a mere broker; but, conceding for argument's sake that he was in some sense a broker, still he was an agent for the defendants, and the question is whether he is such an agent as is contemplated by the statutes, upon whom notice may be had. We do not regard it as necessary that it be shown that defendants paid the expenses of maintaining the office used by Wright. Under the authorities, we do not understand that it is even necessary, to constitute an agency, that there should be any particular room or place. In this case, it is shown that there was an office and agency in Polk County, Iowa, by the appellees, and that Wright is the agent, and that this action grows out of and is connected with such agency. He was taking these applications not only from the plaintiff, but from others, and over a period of some two or three years' time. The application of plaintiff was made in 1911, and there was nothing in the record to show any change in the method of doing business between that time and the date when the telegrams set out in the evidence were exchanged. The contract was returned to Wright after it had been approved by the company. Wright received money on the contract and forwarded the same to defendants. It does not appear in the record that Wright had any other business or that any other person was conducting the busi-

ness or connected therewith but Wright. Defendants accepted the benefits of the transactions with Wright and the plaintiff. Wright had more or less to do with visiting the defendants in regard to defendants' business. The telegrams set out show that Wright was their authorized agent. Under these and all the circumstances in the case, we think he comes fairly within the terms of Sec. 3532 of the Code, and, as to the corporation defendants, under both Secs. 3529 and 3532.

Wright's testimony is somewhat contradictory and evasive. In his affidavit, he states that he is not the agent of any of the other defendants; that he is not in their employ. In his evidence, he says he can't remember his individual transactions with plaintiff; don't know what his personal transactions were. He talked with them a little, but what transactions there were he can't say. Some of these statements are in the nature of conclusions, but when he comes to testify as a witness and states the facts, it is shown that he was their agent, that he did receive compensation, and that he did do business for them. In one place in his testimony, he says he never received any compensation on this deal whatever, and yet he admits on cross-examination that he did receive a commission. In his evidence, Wright seems to try to create the impression that he was not trying to sell Florida lands at all, but that if the people came to him and insisted upon it, he would accommodate them by taking their applications and sending them in, and the purchasers might have the privilege of sending their money to his principals, but, when sued, that he had nothing to do with them as their agent, and thus put it beyond the power of the court to cope with such situation.

Counsel for appellees seek to distinguish cases wherein defendant is a non-resident of the state and wherein he is a resident of the state, but a non-resident of the county wherein suit is brought. Such was the contention in *Gross v. Nichols*, 72 Iowa 239. But the court in that case ruled that such posi-

tion could not be sustained. The statute then was the same as 3532 now.

Without reviewing the cases upon the subject, we think this case comes within the rules laid down in the case of *Milligan v. Davis*, 49 Iowa 126; *Gross v. Nichols*, *supra*; *Locke v. Chicago Chronicle*, 107 Iowa 390; *Farmers Insurance Co. v. Highsmith*, 44 Iowa 330; *Bell Jones Co. v. Erie Co.*, 168 Iowa 96.

We think the evidence which we have set out shows that the non-resident defendants were acting together in this business, if, indeed, they are not all one concern, and that Wright was the agent for all of them. Wright testifies in regard to an arrangement had at the time when the Murphy contract was obtained by the Girardeau Company, and says that his arrangement with the Albany Pecan Development Company is somewhat different in detail and compensation than the one with the Girardeau Company. The plaintiff's contract seems to have been transferred to the Albany Company, and payments were made thereon both before and after such transfer. The application was accepted by defendant, J. H. Girardeau, Jr. The telegrams show that Wright was the agent for the Albany Company. Plaintiff testifies that he made a trip down to his pecan grove in January, and that at that time the Albany Company was doing the developing.

We are of opinion that the trial court erred in sustaining appellees' motion to quash. We think the service was sufficient. The order and judgment is, therefore—*Reversed*, and the cause—*Remanded* for trial.

DEEMER, C. J., EVANS, WEAVER and LADD, JJ., concur.

In the Matter of the Estate of CHARLES B. PHILPOTT, Deceased,
ED. LE CLERC, Claimant, Appellee, v. EVA B. PHILPOTT,
Executrix, Appellant.

BILLS AND NOTES: Demand Note—Unreasonable Delay in Nego-

- 1 **tiating—Dishonor—Jury Question.** A demand note, negotiated an unreasonable time after its date, proclaims to all the world, "I have been dishonored. Take me at your peril." (Secs. 3060-a7, 3060-a53, Sup. Code, 1913.) What constitutes an unreasonable delay depends on "the facts of the particular case." (Sec. 3060-a193, Sup. Code, 1913.) In instant case, the negotiation was over seven months after the issue of the note. *Held*, the court was in error in not submitting the question of unreasonable delay to the jury.

BILLS AND NOTES: Irregular on Face—Negotiability Destroyed.

- 2 A note payable "on or before four — after date," is not "complete and regular on its face," is not negotiable, and he who takes the same is not a "holder in due course." (Sec. 3060-a52, Sup. Code, 1913.)

BILLS AND NOTES: "Holder in Due Course"—Presumption—

- 3 **Fraudulent Negotiation—Burden of Proof.** The law proceeds on the assumption that every holder of a negotiable instrument is, *prima facie*, a "holder in due course" (Sec. 3060-a59, Sup. Code, 1913), but whenever it appears that the instrument was negotiated "in breach of faith or under such circumstances as amount to a fraud" (Sec. 3060-a55, Sup. Code, 1913), then the law presumes no longer, but calls upon the holder to prove that he is in fact a "holder in due course." (Sec. 3060-a52, Sup. Code, 1913.)

PRINCIPLE APPLIED: In instant case, the maker and payee by written agreement cancelled the notes, the payee agreeing to return the notes to the maker. In violation of this agreement, the payee negotiated the note. The question of good faith and notice was in the record. The holder was content to show that he had taken the notes of the payee and held the note in suit as collateral. The court directed a verdict for the holder. Court says: "It is too clear for argument that such testimony did not conclusively meet the burden of proof laid upon him."

BILLS AND NOTES: Note Marked Paid—Presumption—Jury Question. An entry on a note that it is cancelled and paid raises a presumption that such is the fact, and even though a farther entry is made thereon that such cancellation entry was an error, nevertheless, the real truth of the matter, under instant record, was for the jury, not for the court, the issue at this point being whether the collateral was discharged by the cancellation of the principal notes.

Appeal from Polk District Court.—HON. HUGH BRENNAN, Judge.

WEDNESDAY, MARCH 17, 1915.

ACTION upon two promissory notes. The action is in the form of a claim filed against the estate of decedent, the notes being the basis of the claim. The plaintiff was not the payee of the notes but claims as a holder in due course. A defense was pleaded, good as against the payee. The trial court directed a verdict for the plaintiff on the ground that he was a holder in due course without notice of infirmity in either note. The defendant executrix appeals.—*Reversed.*

Mac. J. Randall and Read & Read, for appellee.

Clinton L. Nourse, for appellant.

EVANS, J.—The defendant is the executrix of the estate of her husband, C. H. Philpott. On June 12, 1911, Philpott entered into a contract with the American-Canadian Land Company, a co-partnership, for the purchase of certain Texas lands, and executed his notes therefor to a total of about \$7,000. October 25, 1911, this contract was cancelled by a written agreement and the land company agreed to return to Philpott his notes. The return was never made. Philpott died a year later. The claim herein is based upon two of said notes, one for \$1,500 and the other for \$1,000. The defense here indicated being good as to the payee of the notes, the ultimate question is whether upon this record it conclusively appears that the plaintiff was in good faith a holder in due

course, so as to require a directed verdict in his favor. This ultimate question depends upon two or three preliminary ones, viz.: (1) Was each note negotiable on its face? (2) Was the title of the person who negotiated the note to the plaintiff, defective? (3) Upon which party was the burden of proof as to the good or bad faith of the plaintiff?

I. First as to negotiability. The \$1,500 note is conceded to be negotiable upon its face and due in three years after date. The defendant challenges the negotiability of the other

note. It was drawn payable "on or before

1. **BILLS AND
NOTES: demand
note: unrea-
sonable delay
in negotiating:
dishonor: jury
question.**

four — after date." It does not appear therein whether it was to become payable in *four days*, *four months*, or *four years*. The de-

fendant contends that, because of this defect,

the time of maturity was rendered uncertain and the negotiability of the instrument was thereby destroyed. On the other hand, plaintiff contends that inasmuch as no time of payment was actually expressed, it became a note payable on demand, under Sec. 3060-a7. Adopting for the moment the plaintiff's contention at this point, and reading the note as payable on demand, another difficulty confronts him. Upon the negotiating of such a note an unreasonable length of time after its issue, the holder is not deemed a holder in due course. Sec. 3060-a53. In this case the date of issue was June 12, 1911, and that of negotiating, January 18, 1912. Under the authorities, a reasonable time for the negotiating of a demand note is rather brief. Its dishonor is not long delayed. In the following cases respectively, two days, seven days, and thirty days were held to be a reasonable time: *Field v. Nickerson*, 13 Mass. 131; *Thurston v. M'Kown*, 6 Mass. 428; *Ranger v. Cary*, 1 Metc. 369.

In the following cases respectively, two months and a half, three months and a half, and eight months have been held beyond a reasonable time and sufficient to dishonor a demand note: *Losee v. Dunkin*, 7 Johns. (N. Y.) 70; *Stevens*

v. Bruce, 21 Pick. 193; *Ayer v. Hutchins*, 4 Mass. 370; *Bank v. Jenness*, 2 Metc. 288.

There is, however, no definite rule to be applied, and among other elements "the facts of the particular case" are to be considered. 3060-a193. It is clear, therefore, that the defendant was entitled to go to the jury on this question if upon no other.

II. As to this particular note, there is a further consideration that militates against the plaintiff as a holder in due course. Sec. 3060-a52 is as follows:

2. **BILLS AND NOTES:** Irregular on face: negotiability destroyed.

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That the instrument is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

This note was not "complete and regular" upon its face. It indicated upon its face that some word had been omitted in an attempted specification of the time of payment.

If it were made to appear that the real contract between the parties was that the note should be payable in four *months* or four *years*, the instrument was reformable in equity at the suit of either party. This would not destroy the validity of the note, but it would destroy its negotiability until such reformation was had. The manifest irregularity in this case is not one of the "omissions" specified in Sec. 3060-a6, which section is as follows:

"The validity and negotiable character of an instrument are not affected by the fact that:

"1. It is not dated; or

"2. Does not specify the value given, or that any value has been given therefor; or

"3. Does not specify the place where it is drawn or the place where it is payable; or

"4. Bears a seal; or

"5. Designates a particular kind of current money in which payment is to be made.

"But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument."

Sec. 3060-a14 provides for the filling of blanks by the holder of an instrument duly signed within the scope of the holder's authority as follows:

"Where the instrument is wanting in any material particular, the person in possession thereof has a prima-facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima-facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Such instrument is thereby rendered negotiable. But it becomes so *after* the blanks are filled and not before. If the

real intent of the parties in interest was to make this instrument payable in four years, it may be that the payee could have lawfully corrected the oversight by inserting the word "years"; and it may be also that this would have rendered the note negotiable to a holder in due course as defined in the section above quoted. The question in that form is not now before us and we need not pass upon it. We think it quite clear that this irregularity upon the face of the note prevented its taker from becoming a holder in due course. It could be deemed a demand note, unless the agreement of the parties was in fact otherwise. If otherwise, such fact was suggested by the incompleteness of the terms actually used.

The controlling fact at this point is, not that the blank was not filled, but that it *was filled imperfectly* or irregularly. Though we grant that the note was presumptively good as a demand note, yet it was not "complete and regular" within the requirements of Sec. 3060-a52, and therefore was not negotiable.

III. As to the \$1,500 note, the primary question is, Was the title of the payee defective when he negotiated the same to the plaintiff on January 18, 1912?

3. BILLS AND
NOTES: "holder
in due course":
presumption:
fraudulent
negotiation:
burden of
proof.

"The title of a person who negotiates an instrument is defective within the meaning of this act (Negotiable Instrument Act) when . . . or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Sec. 3060-a55.

In this case, the plaintiff took the note in question from the payee. The evidence was abundant to show that such negotiation was in breach of faith on the part of the payee.

Sec. 3060-a59 provides as follows: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove

that he or some person under whom he claims acquired the title as a holder in due course."

The defendant, therefore, having introduced sufficient evidence to show that the title of the payee was defective when the negotiation was made, the burden was thereby cast upon the plaintiff to show, notwithstanding, that he was a holder in due course within the conditions specified in Sec. 3060-a52. We find in the record little, if any, attempt to prove these conditions affirmatively. The field of good faith was involved, with its possible ramifications. Likewise the field of notice. The plaintiff was called to the witness stand by the defendant and testified as follows:

"I am the claimant herein. In January, 1912, the American-Canadian Land Company made two notes to me: one for \$2,000 and the other for \$4,700, and for these two notes I claim to hold the notes Exhibits 'B' and 'C' as collateral. I now produce the two notes above referred to, the one for \$2,000 is dated January 18, 1912, and marked by the reporter, Exhibit 'E' and the other for \$4,700 of the same date, marked by the reporter, Exhibit 'F'."

Exhibits "B" and "C," referred to in his testimony, were the notes in suit. The foregoing was his entire testimony as to the circumstances attending his acquisition of the notes. It is too clear for argument that such testimony did not conclusively meet the burden of proof laid upon him.

For previous cases see *Bank of Bushnell v. Buck Bros.*, 161 Iowa 362; *Iowa National Bank v. Carter*, 144 Iowa 715, 722; *Arnd v. Aylesworth*, 145 Iowa 185, 191; *McNight v. Parsons*, 136 Iowa 390, 399; *Bennett State Bank v. Schloesser*, 101 Iowa 571, 573; *Commercial Bank of Essex v. Paddick*, 90 Iowa 63, 66; *Frank v. Blake*, 58 Iowa 750; *City Bank v. Green*, 130 Iowa 384; *Citizens' Bank v. Houtchens*, 64 Wash. 275; *Johnson County Savings Bank v. Rapp*, 47 Wash. 30; *Bank v. Walker*, 82 Conn. 24; *New England Mortgage Sec. Co. v. Gay*

(C. C.) 33 Fed. 636, 649; *Shellenberger v. Nourse*, 20 Idaho 323; *Bluthentahl v. Columbia*, 175 Ala. 398; *Winter v. Nobs*, 19 Idaho 18; *Parsons v. Jackson*, 99 U. S. 434; *Ireland v. Scharpenberg*, 54 Wash. 558; *National Bank v. Kirby*, 108 Mass. 497; *Merchants' National Bank v. Wadsworth*, 166 Mich. 528; *Union National Bank v. Mailloux*, 27 S. D. 543; *Citizens' Sav. Bank v. Couse*, 68 Misc. Rep. 153; *Union National Bank v. Winsor*, 101 Minn. 470; *Park v. Winsor*, 115 Minn. 256; *Iowa National Bank v. Carter*, *supra*.

IV. It appeared in evidence that the plaintiff claimed to hold the notes in suit as collateral only for the security of two notes of the American-Canadian Land Company for \$2,000 and \$4,700 respectively. These notes purported to have been executed January 18, 1912. Upon notice served by defendant, they were brought into court. They appeared upon their faces to have been paid and cancelled. The plaintiff testified that they were not in fact paid and that the cancellation was a mistake. An entry had been made upon the notes to that effect and the entry had been signed by members of the partnership. Manifestly, if such notes were paid, the plaintiff was no longer a holder in due course of the collateral. The appellant contends that upon the evidence here disclosed the question was for the jury as to whether such notes were paid and the collateral thus discharged. We see no escape from this contention. Surely the cancellation stamp upon the notes was *prima facie* sufficient to prove the discharge of the collateral. The truth and good faith of the explanation was pre-eminently a question of fact. It is urged by appellee that the pleadings made no issue at this point. It is true that no pleading of the defendant alleged the payment of the notes for which the collateral purported to be held. We do not think she was required to plead to such effect. The facts thus developed on the trial were peculiarly within the knowledge of the plaintiff and outside the knowledge of the defendant. The defendant's pleadings did challenge the plaintiff as not a

4. **BILLS AND
NOTES:** note
marked paid:
presumption:
jury question.

holder in due course and for that reason claimed the right to interpose her defense against the original payee. We think the pleading was sufficient to call in question the good faith of the plaintiff's claim as a holder in due course.

We reach the conclusion that the plaintiff was not entitled to a directed verdict and the order of the trial court is therefore—*Reversed*.

DEEMER, C. J., LADD and PRESTON and SALINGER, JJ., concur.

DEEMER, C. J. (Concurring).

While I agree to the result reached, I am not satisfied with that part of the opinion holding that the note in suit is non-negotiable because of uncertainty as to the time of payment.

Code Sec. 3060-a7 provides that "an instrument is payable on demand:

"1. When it is expressed to be payable on demand, or at sight, or on presentation; or

"2. In which no time of payment is expressed."

The first paragraph does not apply to the note in suit, but the second does, as I understand it.

The majority say that there is an unfilled blank in the note, and suggest that it was intended to insert therein days, months or years. How do we know that, except from inference? Surely no time for payment is *expressed*, and the statute says in terms that, if not expressed, it is payable on demand. It does not say that it is not negotiable if it be inferred that it was the intention of the parties to fill the bill, but specifically provides that if no time is expressed it is payable on demand. It is suggested that the note might be re-formed in equity and the blank filled in such a suit. Any note is subject to be re-formed in equity, but that does not necessarily destroy its negotiability.

The statute quoted is but a codification of the law merchant, and courts have held under that law that a note in

which there is an unfilled blank as to the time of payment is payable on demand, and is negotiable. See Daniel on Neg. Inst., Sec. 88, wherein he says: "If the time of payment be left blank, as for instance, if the instrument be payable — months after date," it is payable on demand. Citing: *McLean v. Nichlen*, 3 Vict. 107; *Stowe v. Merrill*, 77 Me. 550. See also, sustaining the same rule: *Hotel Lanier v. Johnson*, 30 S. E. 558 (Ga.); *Young v. Ellis*, 21 S. E. 480 (Va.); *McVeigh v. Howard*, 13 S. E. 31 (Va.); *O'Mohundro v. O'Mohundro*, 21 Gratt. 626.

If payable on demand, it was negotiable and complete and regular on its face, and not subject to reformation in the hands of an innocent purchaser for value. Even if the note be not fair and complete on its face, the only uncertainty is as to the time of payment. This uncertainty did not give notice of any other infirmity in the note or indicate that the consideration had failed or that it was negotiated in bad faith. The blank could have been filled in by any holder, and in any event it could be filled to express the true date as agreed upon by the parties or by action in equity.

That the defect was not notice of infirmities see the following cases: *Müller v. Crayton*, 3 N. Y. Sup. Ct. Rep. 360; *McSparran v. Neeley*, 91 Pa. 17, and cases cited.

THE PHOENIX FIRE EXTINGUISHER COMPANY, Plaintiff, Appellant, v. T. M. SINCLAIR & COMPANY, Limited, Defendant, GRIMM & TREWIN, Motion Defendants, Appellees.

ATTORNEY AND CLIENT: Judgment on Motion—Appeal—How

- 1 **Tried.** A "judgment on motion" against an attorney in favor of the client is triable on appeal *on errors only*—not *de novo*. This rule is not changed by the fact (a) that the lower court heard the case under stipulation that "all evidence shall be taken subject to objections," or (b) that the original cause in which the attorney collected the money was in equity and the same title was retained in the summary motion for judgment, or (c) that the certification of the evidence referred to the summary proceeding as one "in equity."

APPEAL AND ERROR: Actions—How Tried on Appeal—Certifi-
2 **cation of Evidence—Effect.** An action “at law” is not thrown to the “equity” side of the calendar by a certification of the record referring to it as a “proceeding in equity.”

WITNESSES: Refreshing Memory from Memoranda—Proper Cir-
3 **cumstances.** A witness may refresh his memory, in an action on account, by referring to his book of “original entries,” though the entries were not made by him, but under his direction and when made he knew them to be correct. For the same purpose he may refer to a slip or list made from the book of original entries for convenience, he having verified the correctness of the slip.

APPEAL AND ERROR: Appeal in Law Action—Findings of Trial
4 **Court—Support in Evidence.** In an action tried at law by the court, the finding of the court that a matter in issue was established “without conflict,” will not support a claim of error when there is evidence supporting such finding.

MOTION of plaintiff to compel Grimm & Trewin, Attor-
neys, to account for money collected.

Appeal from Linn District Court.—HON. W. N. TREICHLER,
Judge.

WEDNESDAY, MARCH 17, 1915.

A summary proceeding instituted by motion of the plaintiff against its attorneys in the above entitled case under the provisions of Code Sec. 3826. Upon trial had on the merits, judgment was rendered for the defendants. Plaintiff appeals.
—*Affirmed.*

Deacon, Good, Sargent & Spangler and Jamison, Smyth & Hann, for plaintiff and appellant.

F. F. Dawley and C. E. Wheeler and Barnes & Chamberlain, for appellees, Grimm & Trewin.

EVANS, J.—Grimm & Trewin were attorneys for the plaintiff in the trial of the above entitled case in the district court of Linn county.

The defendant named in the title of said case has no interest in these proceedings, the title of the original case being retained because the proceeds of the judgment entered therein are the subject of the controversy between client and attorney and because the summary proceeding was instituted by a motion filed in the original case as provided by Code Sec. 3826. For convenience in the discussion, Grimm & Trewin will be referred to as defendants and the original plaintiff as plaintiff.

The original suit was an action brought by the plaintiff against the original defendant to recover an alleged balance due of about \$12,000 on certain contracts involving the installation of fire extinguishing apparatus in the packing plant of such original defendant. The full amount of the contracts of such parties involved over \$60,000. The original contract required the completion of the job in 120 days. There was a delay of nearly one year in the completion of the work. The original defendant set up a counter-claim for damages for the delay substantially equal to the amount claimed in the petition. There were many reasons and counter-reasons for the delay. The final decree in the case found the plaintiff responsible for some of them and the original defendant responsible for others. In the main, the plaintiff was successful and recovered a judgment for a little more than \$9,900. The record of the trial was an exceedingly voluminous one and 21 court days were consumed in its trial. The plaintiff's attorneys collected the judgment and retained \$2,700 as their fees for services. \$500 additional was paid to the plaintiff's Chicago attorney, about which no controversy is made here. The one question in this case is whether the \$2,700 charged by the Cedar Rapids attorneys was more than the reasonable value of the services rendered or whether the services charged for were greater than were reasonably necessary in the trial of such case. The trial court found for the defendants.

I. The first question presented for our consideration is whether the case is triable here *de novo* or on errors only. The

plaintiff appellant contends that it is triable *de novo* and that claim is resisted by the defendants. The appellant concedes that the proceeding is special and that in the absence of stipulation it would be triable at law and not in equity. It is contended, however, that there was a stipulation entered into which was in effect an agreement to try the case as an equitable proceeding in the court below and that it was accordingly so tried. The stipulation relied on was as follows:

1. ATTORNEY AND
CLIENT: "judg-
ment on mo-
tion": appeal:
how tried.

"It is understood and agreed between the parties to this action that in the trial of this case the court shall not be required to rule upon objections to the admission of the evidence, when the objection is made, but that all evidence shall be taken subject to the objections."

We see nothing in this stipulation which purports to try the case as an equitable proceeding or on the equity side of the court. The trial was had to the court without jury and this was in accordance with the statute. The stipulation is not an unusual one in law actions in a trial before a court without a jury. It tends to expedite proceedings and it enables the defeated party to save his record of objections and exceptions without requiring immediate and repeated rulings of the court. It also enables questions of evidence to be reserved for the final argument and it enables the court to rule upon the objections in the light of the whole record. If anything more was intended by the stipulation above quoted it is not made apparent therein.

Some stress is laid by the appellant upon the title of the case as adopted by both parties in all the pleadings and papers filed. The original case was in equity and its title so indicated. This title was preserved in all papers filed in this summary proceeding. The plaintiff's motion was filed in such case and the summary proceeding thus provided for by statute became, so to speak, attached to the original case. This was in accordance with the statute. If the use of this title ren-

dered the proceedings triable in equity, then every such motion in an equity case must be tried by equitable proceedings. But the plaintiff does not contend that this is so and concedes to the contrary. It does, however, contend that the use of the title was confirmatory evidence of the intended agreement of the parties to try the issue as an equitable one. We think it quite clear that the title of the motion was determined by the original case. No other written pleading of any kind was necessary under the statute. (Code Sec. 3830).

It is further urged by appellant that in the certification of the evidence after the trial of the case, it was referred to therein as a "proceeding in equity." It is urged that this

2. **APPEAL AND ERROR:** actions: how tried on appeal: certification of evidence: effect.

was a finding or a declaration by the trial court which is conclusive. It may be noted here that the trial court subsequently corrected its certificate in that regard and struck out therefrom the phrase above quoted. From

such order of correction, the plaintiff has also appealed and such appeal has been submitted here with the main case. Whether the motion of plaintiff was or was not tried as an equitable proceeding was a question quite independent of the final certification of the record. The fact was fixed before the time of certification had arrived. It was no part of the function of the certificate to determine such fact nor to preserve it, nor could the actual status of the proceedings be changed from the law to the equity side or vice versa by any recital in the certificate to the evidence. The trial court, therefore, properly corrected the certificate and this will be sufficient indication of our views as to the second appeal.

II. Our foregoing conclusion is practically determinative of the appeal. The finding of the lower court has the effect of a verdict. Beyond question it has substantial support in

3. **WITNESSES:** refreshing memory from memoranda: proper circumstances.

the evidence. We have no occasion, therefore, to go into the larger merits of the case on the evidence. Two alleged errors are pointed out in the plaintiff's brief. Grimm testified to the

number of days of the services rendered. To aid his memory

in this respect he used the book of original entries of the firm and a slip upon which dates had been gathered from the book of original entries. None of the entries in the book nor on the slip were in the handwriting of Grimm. The entries had all been made by the bookkeeper, so far as the writing was concerned. The book entries had been made under the direction of Grimm. He was familiar with them at the time and knew their correctness at such time. The slip also was made on his direction and checked over by him. It is urged by appellant that his testimony was rendered incompetent because of his dependence upon the memoranda and because the memoranda were not such as could legally be used to refresh the memory of the witness. So far as the book was concerned, Grimm's familiarity with the entries at the time they were made was clearly sufficient to entitle him to refer to them as an aid to his memory. The slip was merely of temporary convenience. Its accuracy could be then and there verified from the various pages of the book. The objection to it was only that it was not made by the witness. We think the use of the memoranda was properly permitted. The witness was clearly competent to testify to his best recollection as to the extent of service rendered. The use of the memoranda tended to the aid of such recollection, and to render the same more definite and accurate. We find no support for the appellant on this point in the cases cited in the brief, viz.: *Graham v. Dillon*, 144 Iowa 82; *Porter v. Madrid State Bank*, 155 Iowa 617. The cited cases support the use of the memoranda in question.

III. In disposing of the case, the trial court filed a brief written finding. Such written finding included the following: "it appearing without conflict that Grimm & Trewin devoted in the preparation and trial of the case the time claimed by them, and that the charges per diem were reasonable, and that the only question for the court's determination is whether or not Grimm & Trewin's charges included unnecessary time in the preparation and trial of the

4. APPEAL AND
ERROR: appeal
in law action:
findings of
trial court:
support in
evidence.

case." Appellant challenges the finding that the time claimed by the defendant was proved "without conflict." It is not claimed that there is any direct evidence contradicting such claim. It is urged, however, that all the circumstances of the case should be regarded as presenting such a conflict. This proposition, however, is only a matter of argument and fairly goes to the weight of the evidence. The weight of the evidence was for the trial court and the findings are consistent with the exercise of such responsibility. Indeed it would be difficult to point out any circumstances in the case which impeach the claim of actual time except as it might be found that the time claimed was not reasonably necessary to the care of the case. This distinction was preserved in the mind of the court and is indicated in the written finding. Subject to this distinction, there was no conflict even in the sense urged by the appellant.

As to the value of the services, there was substantial agreement in the expert evidence on both sides as to the reasonable rate of compensation. Each side presented to its expert its own hypothetical question. The difference in the hypothetical questions was such as to call for a different sum total even upon the same rate of compensation. That is to say one question predicated greater service rendered than the other.

No other errors are presented for our consideration apart from the fact merits of the case. These assignments of error cannot be sustained. The judgment below must therefore be —*Affirmed*.

LADD, PRESTON and GAYNOR, JJ., concur.

STATE OF IOWA, Appellee, v. CHARLES T. COOPER, Appellant.

FALSE PRETENSES: Evidence Supporting Verdict—Sufficiency.

- 1 Evidence reviewed and held to support a verdict of guilt of obtaining property by false pretenses.

FALSE PRETENSES: Worthless Check Dated Ahead—Effect. The

- 2 fact that the worthless check upon which money was obtained was dated ahead one day has no effect on defendant's guilt when the uncontradicted testimony showed that when the money was obtained accused represented that he *then* had money in the bank to meet the check, when the evidence showed he had no money in the bank before, on, or after the date of the check.

FALSE PRETENSES: Indictment—Reliance on Pretenses—Suffi-

- 3 ciency of Allegation. To charge that accused, "by means of false pretenses (setting out the pretenses) did obtain, etc.," sufficiently charges that the property was parted with *in reliance upon the false representation*.

INDICTMENT AND INFORMATION: Form and Substance—Objec-

- 4 tion to—When Waived. Objections to the form or substance of an indictment not made before the jury is sworn are waived. (Sec. 5289, Sup. Code, 1913.)

PRINCIPLE APPLIED: Indictment for false pretense. After trial and in a motion in arrest of judgment the accused first raised the question that the indictment (a) did not sufficiently allege that the property was parted with in reliance "upon the false representation" and (b) did not set forth the false pretenses. *Held*, in the instant case, if the objections had any merit they were waived under above principle of statute.

CRIMINAL LAW: Trial—Requested Instruction—Point Covered by

- 5 Court. The refusal of a requested instruction followed by the complete covering of the point in the court's instructions leaves no error.

CRIMINAL LAW: Appeal—Instructions—No Objections Before

- 6 Reading—Waiver. The court is under no obligation to review instructions as to which no objections were entered prior to the reading thereof to the jury. (Sec. 3705-a Sup. Code, 1913.)

CRIMINAL LAW: Instructions Considered as a Whole. It is an
7 ancient and threadbare rule that instructions must be construed
as a whole. Instructions reviewed and held to be sufficiently
connected.

CRIMINAL LAW: Trial—Verdict—Form of—Sufficiency. “We the
8 jury, find the defendant (naming him) guilty as charged,” the
instructions fully setting forth the offense, meets all legal re-
quirements. (Sec. 5405, Code.)

CRIMINAL LAW: Insanity of Accused—When Criminal Proceeding
9 **Suspended.** The court is justified in refusing to suspend criminal
proceedings and to empanel a jury to inquire into the sanity of
the accused when the insanity of the accused was never in any
manner suggested until after the court had opened proceedings
to sentence the accused. (Sec. 5540, Code.)

CRIMINAL LAW: Trial—Improper Argument—Objection to—Suf-
10 **ficiency.** An objection “to each and every word of said speech”
made when the county attorney *arose* to make his argument, raised
no question.

CRIMINAL LAW: Improper Argument—New Trial—When Granted
11 **—Discretion of Court.** Improper argument, of itself, is not
ground for new trial. It is essential that it affirmatively appear
that by reason thereof the accused has been deprived of a fair
trial. Ordinarily the judgment of the trial court is superior
on that question to the judgment of the appellate court.

FALSE PRETENSES: Excessive Sentence—Reduction. A sentence,
12 in instant case, to confinement in the penitentiary, reduced to
confinement in the county jail.

Appeal from Scott District Court.—HON. M. F. DONEGAN,
Judge.

WEDNESDAY, MARCH 17, 1915.

DEFENDANT was convicted of the crime of obtaining money
by false pretenses, and appeals.—*Modified and Affirmed.*

W. H. Petersen, Scott & Scott and Chezen & Kelley, for
appellant.

George Cosson, Attorney General, and John Fletcher,
Assistant Attorney General, for the State.

PRESTON, J.—1. Appellant has made thirty assignments of error. They may be grouped as follows: Error of the court in overruling the defendant's motion for new trial and in arrest of judgment, because the verdict is not supported by the evidence and is contrary to the instructions; that the indictment is defective; misconduct of the prosecuting attorney in the closing argument; refusal of the court to impanel a jury on the question of the defendant's sanity, which was demanded after verdict and when sentence was pronounced; error in the instructions given and in refusing to give instructions asked; and some other minor matters which will be referred to.

1. FALSE PRE-
TENSES: evi-
dence support-
ing verdict:
sufficiency.

It appears, without any conflict in the evidence, that between eight and nine o'clock in the forenoon of June 10, 1913, defendant went into the place of business of one C. P. Fetterer in Davenport. Defendant asked Fetterer if he would cash a check for defendant, and, as the witness states it:

"I replied to that, 'Yes, sir. Yes, I will cash your check if you have money in the bank.' He said, 'Sure I have.' Then I said, 'In this bank on this check?' I had the check then; Mr. Cooper had given it to me. After he handed the check to me I asked him if he had money in the bank. I took the check and looked at it and looked at the other side, turning it over, and then I says, 'Have you got any real cash for the check? Have you money in the bank?' and he says, 'Yes.' I pointed out the name of the bank on the check and asked him if he had money in this bank, and he said yes to that. Then I cashed the check."

Witness testifies that he believed his statement, and on cross-examination says he had confidence in defendant. Later in the forenoon of the same day, the witness presented the check to the bank upon which it was drawn, and payment was refused. The check was dated June 11, 1913, but this witness testifies that he did not notice the date and did not know it was dated the 11th. The witness then went to defendant's

office and informed him that he had been to the bank and payment had been refused. Defendant took the check and looked at it and said that it was not due.

One O'Neal, an attorney who had an office with defendant, told the witness that he would have the money down at the bank at nine o'clock the next morning. Between ten and eleven o'clock the next forenoon, witness went to the bank, and payment of the check was again refused.

Witness Telcamp, an employe of Fetterer in his saloon, was also present at the time the check was cashed and, while he did not hear all the conversation, he testifies that he did hear Fetterer inquire of defendant whether he had money in the bank named in the check, and heard defendant say that he had.

Witness Bruning, employed in the bank in question, testifies that defendant did not have an account at the bank on the 10th or 11th of June, 1913, and that he never had an account there at any time. He testifies that O'Neal came to the bank about four o'clock in the afternoon, after the bank had closed, and by the back door, and wanted to pay the check, and was informed that the check was not there. Bruning thinks this last named transaction was on the 11th of June, but O'Neal himself testifies that it was on the 12th and that it was after the matter had been placed in the hands of the county attorney and an information filed against the defendant, or at least prepared.

Witness O'Neal, for the defendant, testified to the visit of Fetterer to defendant's office on June 10th, and that he called Fetterer's attention to the fact that the check would be taken care of. He testifies that he went to Fetterer's place of business between two and three o'clock on June 12th and wanted to take up the check, but was informed by Fetterer that he did not have the check; that it was in the county attorney's office. O'Neal says that, being unable to make any arrangement in the way of a settlement, he left, and that after that, on the 12th of June, he went to the bank; that when

he went to the bank he offered to open an account and stated that he wanted to take up the check, and was informed by the bank that they did not have the check. He says he placed the money on the counter. He says the bank did not exactly refuse to let him open an account, and he did not do so and did not leave the money; that he intended to deposit the \$20.00 he had with him in the name of Cooper; that he intended to open an account in Cooper's name, but did not do it, and that it was Cooper's money; that on the 12th of June, just before he went to the bank, he went to the county attorney's office and tried to settle the matter there; that this was about three o'clock in the afternoon of the 12th, and it was at that time that he saw papers in the office and inferred from the conversation that an information had been prepared.

The defendant himself testified as a witness and said that he cashed the check at Fetterer's place on June 10th; that the amount of the check was \$13.00; identified Exhibit "One" which had been offered in evidence as the check; that the name on the check was his name and his signature; says he cashed the check with the intention that an ordinary man has that cashes a check, to pay it off; that he did not have any intention to defraud Mr. Fetterer out of that amount of money, or any other amount; that such an accusation is perfectly insane; and that such a thought as that would be insane.

An attempt was made on cross-examination of Fetterer to get him to say that at the time the check was cashed defendant asked him if he would take a chance on him, or on cashing the check, but the witness denied that such language was used, and there is no other evidence in the case on that subject.

We have stated the substance of all the testimony. The verdict of the jury has abundant support in the testimony. In fact, in our opinion, there can be no question as to the defendant's guilt. There is no denial of the testimony of the two witnesses who heard the statements made at the time the check

was cashed. It is true the defendant testified that he did not intend to defraud, and it may be said there was a conflict as to this, but, from all the facts and circumstances, the jury were amply justified in finding that he did intend to defraud, and that the matter of attempted settlement or payment of the check occurred after the crime was complete and after the prosecution had been commenced. This disposes of the assignments of error in regard to the sufficiency of the evidence.

This is not a question of a person overdrawing his bank account by mistake, or believing the check would be paid even though overdrawn. This defendant never had an account at

this bank, and there is nothing to show that he expected the bank would pay it. The evidence was to the effect that defendant represented that he had money in this bank. It is unnecessary to determine whether the mere giving of the check alone was of itself a false representation, though it has been held that a false pretense or representation may be made by an act, as well as by word, and that a person's giving a check where there are no funds to meet it, knowing it will not be paid, is sufficient to constitute a representation. We are unable to see how the fact that the check was dated ahead one day is material under the facts of this case. As already stated, defendant did not have money at the bank either on the 10th or 11th or at any other time, and there is nothing to show that he expected the bank would pay it. The representation was that at the time the check was cashed he had the money in the bank, not that he would have at a future date. Defendant did not at the time the representation was made promise to pay the check at his office, nor was there any statement that he might not have money enough in the bank to pay the check. Dating it ahead was not a mere promise, and the jury may well have found that the whole transaction was a device to cheat. This decision is based upon the fact that false representations were made when the check was delivered.

2. FALSE PRE-
TENSES: worth-
less check
dated ahead:
effect.

2. It is alleged that the indictment is defective. When

arraigned, the defendant pleaded not guilty. There was no demurrer or other attack upon the indictment until after the

trial, when it was sought to raise the question as to the sufficiency of the indictment by motion in arrest of judgment. The assignment of error is, that the indictment does not substantially conform to the requirements of

the Code, in that it is defective in manner and form, as set out in the first ground of the motion in arrest of judgment. The particular grounds stated in the motion in arrest are, that it fails to charge that Fetterer parted with any money relying upon false representation, and because the indictment fails to set out the alleged false pretenses particularly, as required by law. The indictment charges, as to these two matters: "That the defendant did, unlawfully, feloniously, designedly, by means of false pretenses, and with intent to defraud, obtain from C. P. Fetterer, and of the property of C. P. Fetterer, Thirteen Dollars, lawful money, etc."; and as to the second supposed defect the indictment charges that the money was obtained by unlawfully, feloniously, designedly, by means of false pretenses, and with intent to defraud, representing that he had money in the Davenport Savings Bank, and presenting to said Fetterer as being worth its face value, and that it would be paid, a certain check, which is copied in the indictment. As to the second ground, the indictment does set out the representation that he had money in the bank, and as to the first, it charges that the money was obtained by the false pretenses.

It is contended by the State that the objection to the indictment is such that it comes too late by motion in arrest; that, under Chapter 227, Acts of the 33rd G. A., the objection

should have been made before the jury was sworn. Sec. 9 of that act provides that all objections to the indictment relating to matters of substance and form which might be

raised by a plea in abatement shall be deemed waived if not

raised by the defendant before the jury is sworn on the trial of the case. This section was construed in *State v. Boggs*, 166 Iowa 452, 461.

We are of opinion that the objections now urged, if they have any merit, are such as that they should have been made before the swearing of the jury, and they were waived by not making a timely objection.

Counsel for appellant concede in argument that it would have been better practice for defendant to have demurred to the indictment or to have moved to set it aside.

Furthermore, counsel for appellant seem to concede in argument that *State v. McConkey*, 49 Iowa 499, is against their contention. It was there said:

"The indictment charges that, by means of the false token and pretense, the defendant obtained from Hurst the property described. This allegation embraces the idea that Hurst relied upon the representations made, etc."

Other objections are now raised, with cases cited in support, which were not raised below. Such points require no further attention.

3. Defendant requested an instruction, which was refused, to the effect that the intent to defraud must be proven. This point was fully covered in Instruction 10 given by the court. A part of 10 is:
5. CRIMINAL
LAW: trial:
requested in-
struction:
point covered
by court.

"Whether said representations were false and untrue, and whether defendant knew that they were false and untrue, you must determine from all the evidence and circumstances in evidence in connection with said check and with what was said and done by both defendant and Fetterer, and which may throw any light on these questions; but you must further find that such representations were fraudulently made, that is, that they were made with a deliberately planned purpose and intent to deceive and to induce Fetterer to deliver to defendant the ownership and possession of said money. Intent and purpose are seldom, if ever, susceptible of proof by

direct or positive evidence, but are usually a matter of inference from facts and circumstances in evidence in the case, etc."

This is not in conflict with Instruction 6, which simply states the different propositions which the state must prove. No other instructions were asked by defendant. The mere fact, if it be a fact, that defendant intended to repay Fetterer at some future time in some other way, or to repay it if prosecution was commenced, would not of itself relieve defendant from guilt of the crime charged.

Substantially all the instructions given are assailed. We have considered all of them and conclude that every proposition involved was fully and properly covered and that there is no merit in the objections to them. We shall notice some of the objections briefly, although we are not required to do so for the reason that there was only a general exception to the giving of the instructions. Defendant did not, before the instructions were read, or in the motion for new trial, point out the grounds of objections specifically, as required by Chapter 289, Acts of the 35th G. A. The latter part of Instruction No. 8 reads:

"It is sufficient if it be proven to you beyond a reasonable doubt that defendant used language to said Fetterer by which he intended Fetterer to understand that he did in fact have funds in said bank subject to his check, that the check was drawn in good faith, and would be paid when presented in due course of business, and that, from the language so used, Fetterer had a right to understand such to be the defendant's meaning. If you do not so find, your verdict should be for the defendant."

In argument, appellant has omitted the last sentence just quoted. This part of the instruction is objected to on the ground, as appellant states it:

"The court will notice that the trial judge did not preface the eighth instruction, or the objected part thereof, with the words, 'In connection with, or in addition to, what I have previously said and hereafter shall say, it is sufficient,' etc.; that it omits all question of specific intent, and all question of whether or not Fetterer acted thereon, etc."

The first part of that instruction refers to the second of the propositions which the court had stated was necessary for the State to prove, and is in regard to whether the defendant at the time he presented the check represented that he had money in said bank. It is clear that the portion objected to was in connection with what had been said before.

It has been repeatedly held that it is improper to select one instruction, or a sentence therein, and consider it by itself, but that the instructions must be considered together and as a whole.

Again, it is said that defendant was entitled to have his plea of not guilty stated properly to the jury as a material part of the formation of the issues for trial. This was clearly done in the first instruction, which reads in part:

"To this charge the defendant has interposed a plea of not guilty; it is, therefore, incumbent on the State to prove every fact essential to establish guilt in order to warrant conviction, and to do this the proof must be made fully, it must conform substantially to the allegations of the indictment and must establish guilt beyond any reasonable doubt."

Instruction 14 reads:

"If you find the defendant guilty, the form of your verdict should be: 'We, the Jury, find the defendant, Charles T. Cooper, guilty as charged.' If you do not find the defendant guilty, the form of your verdict should be: 'We, the Jury, find the defendant, Charles T. Cooper, not guilty.' When you have agreed upon your verdict, put it in writing upon a separate piece of paper and have it signed, etc."

8. CRIMINAL
LAW: trial:
verdict: form
of: sufficiency.

The verdict rendered was according to the first form and properly signed by the foreman. The objection is, that the verdict should read that the jury find the defendant, Charles T. Cooper, guilty as charged in the indictment, etc. It is said by appellant that there was nothing to indicate what was meant by the word "charged," whether it referred to the indictment or to the judge's instructions, or something else. Instruction No. 1 reads, in part:

"The indictment in this case charges the defendant with the crime of cheating by false pretenses, as I shall hereafter more fully explain. To this charge the defendant has interposed a plea of not guilty."

The instruction in regard to the form of the verdict clearly refers to what is meant in Instruction 1. The instructions presented no charge against the defendant. The jury could not have been misled, and we ourselves are able to comprehend it and determine from the verdict the intent of the jury. The trial court seems also to have understood what the jury meant. Indeed, the verdict, in form, is more specific than the statute requires. Sec. 5405 provides that the jury must render a general verdict of guilty or not guilty, which imports a conviction or acquittal on every material allegation in the indictment, etc.

Counsel rely upon Secs. 5334 and 5335, and Secs. 5409 and 5410. The first two have reference to pleas by the defendant. Sec. 5409 provides for putting an improper verdict in form so that the intent of the jury may be understood. Sec. 5410 is on the same subject, and further provides that no judgment of conviction can be given unless the jury expressly finds against the defendant upon the issue, or judgment is given against him upon a special verdict.

Other objections are urged, but we do not consider them of sufficient importance to further notice them.

5. When the time had arrived for pronouncing judgment and the court was pronouncing sentence, counsel for de-

9. CRIMINAL
LAW : insanity
of accused :
when criminal
proceeding
suspended.

defendant moved that a jury be impaneled to inquire into the sanity of the defendant. This was denied. The statute provides (Sec. 5540) if a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question. Counsel then asked the court for permission to file a charge charging the defendant with being an alcoholic inebriate, as provided for by the Supplement to the Code, and to have the question determined whether or not he is not an alcoholic inebriate, so if the court is determined to pass sentence upon him, the defendant can be sent to the hospital for inebriates, and this was denied.

There was no claim that defendant was insane when the crime was committed or when he was tried. Defendant was himself a lawyer. He cross-examined the prosecuting witness and other witnesses and examined some of his own, made objections to evidence, and testified briefly as a witness. No defense of insanity was interposed. This, of course, could have been done under the plea of not guilty, but there was no claim of that kind until time for sentence. No evidence was introduced on the subject, no medical witnesses, no instructions asked or given on this subject. During the trial defendant did, in his comments, say that a person who would do as it was claimed he had done would be insane, etc. Counsel now say, if they are given another trial, they will plead insanity.

It is claimed defendant was and had been a drinking man. When sentence was about to be pronounced, he addressed the court at some length and became wrought up considerably. It was at this point that the request was made for a jury. As stated, there was no competent evidence on the question as to his alleged insanity. The trial court saw him at the time and during the several days consumed in the trial and evidently had no reasonable doubt as to the sanity of the defendant. The court may have believed that it was

a shrewd move to escape punishment by indirectly claiming insanity. After counsel had requested a jury to inquire as to his sanity, defendant addressed the court and claimed that he was a wreck from drink and that his mind had been affected. It is said by his counsel in argument that, defendant being an attorney, his words were his oath, and that he there suggested his mental condition. By this, we suppose counsel mean that a professional statement by an attorney is equivalent to his oath. It has been so held in some cases, when the statement is given as a professional statement and accepted by the court as such. Such was not the case here. Defendant had just been convicted of crime and was pleading to be allowed to escape. It is, indeed, a most pitiful story, calculated to arouse the sympathy of everyone, to see a man of standing wrecked by drink and convicted of crime. Courts have often to deal with such cases, and, while we ought to consider the frailties of human nature, we ought not to be carried away by unsworn statements made under such circumstances. In his cross-examination of Fetterer, defendant blames the saloons and the saloon business for his downfall, justly so, perhaps, and yet no man in these days can commence the use of liquor without knowing in advance that it is likely to lead to destruction. He has been warned many times and knows the consequences. We would not be justified, on the record, in holding that the court erred in denying the request for a jury, on the question of sanity.

6. It is contended by appellant that there was misconduct on the part of the prosecuting attorney in his closing address to the jury, and that for this there should be a reversal. The entire closing argument was taken by the reporter and is set out in full in the abstract. This matter is not set out in the motion for new trial, or even referred to therein.

One ground of the motion for new trial is, that the verdict is the result of passion and prejudice, and this comes nearer than any other to reaching the matter now being considered. There was no objection or exception to that part of the argu-

ment now complained of, and there is no argument or objection here to the part which was objected to. The objection must be timely. *State v. Sale*, 119 Iowa 1.

When the county attorney arose to begin his argument, defendant asked that the reporter take down

10. CRIMINAL
LAW: trial:
improper
argument:
objection to:
sufficiency.

his speech, and stated that:

“The defendant objects and excepts to each and every word of said speech, and to the whole speech.”

This is not a sufficient objection. We shall set out the parts objected to, and the objection. The county attorney said:

“Oh! There is much in this case, gentlemen, that they wanted to return the money. Why, is that a defense? Why you remember Commodore Fetterer, and he is rightly named the Commodore because he has exhibited some backbone in this case.”

The objection was that Fetterer was not a Commodore, and that it is an expression used here like official positions, for the purpose of impressing the jury. The prosecutor continued:

“And when did he want to return the money? Commodore Fetterer—I don’t care what you call him—Fetterer said that they never offered him any real money until after he signed the information. That is what he has told you, and there is no contradiction about that either.”

The objection to this was, that it was a misstatement of the evidence as testified to before the jury. There was no material misstatement of the evidence, and it was a question for the jury what the evidence was.

No other objection was made to any part of the argument. It may be that a part of the argument now alleged to have been improper was so, unless it was in answer to, or

invited by, the argument for defendant. That part of the argument is:

"This case, as I look at it, gentlemen, is an important case. It involves various propositions. I could say the amount is not large. No, measured by financial measure, the case is not so important, but it is greatly important on account of the questions involved in it. It involves for one thing the question whether this floor in this courtroom is level or not.

"It involves the question whether people with professional degrees or education shall be tried by the same rules of law and be meted out the same kind of justice as some poor boy who never had a chance anywhere—never had a chance in life. How many of these kind of cases do we see in court? Some poor boy has no schooling, perhaps an orphan, loses his mother and gets into bad company, and the first thing you know he goes and commits a crime, possibly like this; and you know, my friends, what they do with him.

"Now, I ask that this defendant, regardless of his intelligence, education or profession, be tried by the same rules of law, and that you give him justice, no more no less, but get exact justice in his case.

"It involves the proposition whether attorneys can be prosecuted or not. It involves the proposition whether when you do or whether you or your family go to attorneys with a property matter, whether you can trust them. It involves the honor and integrity of the Scott County Bar. It involves the proposition whether when men are educated at the people's expense and receive their license to practice an honorable profession at the people's expense, whether then in return they can turn upon the community and prey upon it.

"It involves the proposition of whether saloonkeepers shall be protected from this kind of petty holdups. Aye! in this case they met a man who had a little backbone and he complained. But few saloonkeepers would complain under the circumstances. I think you, gentlemen, can infer as a matter of common knowledge how they run up against the wrong

man. This is why this case is here. I say, gentlemen, for some reasons, different ones, this is an important case, regardless of the amount involved.

"We have had a good deal of agitation here, gentlemen, in saloon circles. We have a right to take into consideration what we know here. Use a little common sense. We don't have to forget what we know. We know this. We know that saloonkeepers in this community, under the mullet law and prohibitory law, live in glass houses, and they are afraid at any time that some little irregularity, without knowing it, they will violate the law. They live a life of fear, and you can get them on any tack. As my old friend, William O. Schmidt says, 'Peace to his ashes.' They never intended when they passed the law in the legislature when I was there, they never intended that a man should live in safety under the mullet law. It is the easiest thing in the world to get them. And we can draw any fair reasonable inference in this case. Cooper went in there and knew the man as a saloon keeper, and we have a right to draw the fairest in the world, that he figured that Fetterer would not make a hollow about thirteen dollars. But if it had been a large amount, the amount of money might have outweighed his fears, and then he would have made a hollow. And so he didn't make it a large amount; he made it a small amount, thirteen dollars. Why, the fact that it is a small amount shows that he intended to defraud, shows how cunningly the plan was laid. He didn't think Fetterer would say anything, and the amount being small. But he reckoned with the wrong man. There is a man without fears in his system; a man that will come to the front and keep the laws up in this community. He met the wrong man, that is what he did, when he ran up against Fetterer."

It is true it does not appear clearly that this argument was in answer to defendant's argument, nor does it appear that it was not so. The trial court heard all the arguments and the entire trial, and in overruling the motion for new

trial, conceding any ground of the motion applied to this matter, held that there was no prejudice.

The rule is that mere misconduct of counsel is not enough alone to require the granting of a new trial, unless it appears

11. CRIMINAL
LAW: im-
proper argu-
ment: new
trial: when
granted: dis-
cretion of
court.

to have been so prejudicial as to deprive the complaining party of a fair hearing of his case by the jury on the evidence. The trial court having heard all that took place on the trial, we ought not to interfere with his discretion in refusing a new trial. *State v. Thomas*, 135 Iowa 717; *State v. Waterbury*, 133 Iowa 135; *State v. Norman*, 135 Iowa 483; *State v. Wilson*, 157 Iowa 698.

If we were to reverse for this, it would be for the purpose only of giving defendant another chance to go free, and this, too, when the evidence shows clearly, and without any substantial dispute, that he is guilty. Such is not the purpose of appeals to this court.

While the argument for defendant to the jury is not shown, the record does show that in cross-examination of Fetterer, defendant was abusive and referred in his questions and comments to Fetterer's business as the cause of defendant's downfall. The county attorney in other portions of his argument referred to these matters, saying that defendant tried "to browbeat, insult and taunt Fetterer," and:

"All the things that were hurled at him with the intention of stirring him (Fetterer) up, he sat there just as calm as a soldier and answered the questions. He didn't come here vindictive, with an enmity toward Mr. Cooper. He told you that at the time the check was passed he had no enmity against him. He told you he had actually confidence in him."

And again:

"He (Petersen, counsel for defendant), tells you here that he was going to drag out the nigger from behind the woodpile and going to make him crawl and creep, and he

used that possibly a dozen times, holding up his hands, 'Now, watch, and don't forget the nigger behind the woodpile.' "

Again the county attorney said:

"They insinuate and charge that there is something wrong somewhere. Well, we are not allowed to guess anything in the case that is not here."

These matters are referred to as tending to show that counsel for defendant may have made some remarks not entirely justified by the record and which the prosecutor in his remarks was answering. We are justified in this inference from the record and arguments in this court. We shall refer to a part only of a number of statements entirely outside the record. Counsel have filed a suggestion of the diminution of the record and a motion in this court to have certified the proceedings and evidence in another proceeding, had since the trial of the instant case, and which has no connection with it. The record and evidence in that case have been certified. Counsel for appellant say in argument that at the time of the transaction in question:

"Defendant was in good standing so far as charges ever having been preferred against him are concerned. Defendant was a widower, having been deserted by his wife. He was a bad cripple, being lame in one of his legs and feet and was and had been an invalid for several years, suffering from various diseases, and had only recently been obliged to undergo an operation for appendicitis—and in addition thereto was a victim of excessive use of whisky and tobacco, to such an extent as to be a complete nervous, mental and physical wreck, although at no great distant date was a man of extraordinary power of mind and of strong influence and possessed of considerable wealth, and was for nearly two decades past looked upon by the people of Scott County, and a good part of the State, as one of its shrewdest trial lawyers and ablest politicians, was both loved and feared and was hated by his

enemies with a persistent hatred because of his successful rivalries. His marital ventures were two, each wife having deserted him, and his melancholy at times knew no bounds, and remorse and melancholy, feeding on the mind, ate away the man and he became, and was, insane. For a year or more immediately prior to this unhappy incident, he had engaged in various conduct which laid him open to criticism, much of which except in the mind of those who are able to know the man and his true condition, would perhaps justly lay him open to the criticism which his enemies and those indifferent to the name of friend or enemy almost constantly heaped upon him. He came of one of the oldest and best families of the pioneers of Scott County and was highly educated, at his own expense, and not at the expense of the county, as was charged by Mr. Vollmer—an Irishman by blood, and for years was true to the Milk-white-Hind, but the passion for drink, encouraged by our system of politics, drew its slimy coils about him and bore him away from family, from church, from wife, from himself."

There is more of the same kind. There is no evidence to support these statements. To support some of them, reference is made to the address of defendant when speaking to the court and not under oath. So that we have the assertion of counsel here based upon the assertion of the defendant. Other assertions are without any basis. The purpose is apparent. The assumption seems to be that this court does, or ought to, decide cases without any regard to the facts or law, and upon assertions of counsel, or through sympathy for a defendant. Counsel insist that the State must strictly comply with the rules, and yet seem to think that the defendant may disregard all rules. It sometimes occurs that there is no meritorious defense and that resort must be had to such means as the only hope of escape.

7. There is no assignment of error that the judgment is

excessive. It is suggested in oral argument. Defendant was sentenced to seven years in the penitentiary. Under the

statute, he could have been given a jail sentence. From what we know of the circumstances of the case, to serve a term of seven years would be too harsh a punishment. It is

not to be supposed that there was any intention that he should serve the full term. There may be circumstances surrounding the defendant, his history and condition, which would justify leniency, or even a pardon, but which would not be properly shown in the record of the trial, or there may be circumstances against him which would clearly be improper and prejudicial to show in the trial. Counsel for defendant asserts that defendant is of the highest standing. The State, in answer to this, says that there is another indictment against the defendant for embezzlement. This is admitted by the defendant, but he says the circumstances were such that an indictment ought not to have been found, and that it has been or will be dismissed. But this whole matter is outside the record. The point I want to make is, that such things are proper to be considered by the board of parole. The theory, or one purpose, as I understand it, of the indeterminate sentence law is to permit a more thorough examination of such matters, and then determine what, under the facts in each case, the punishment ought to be. Obtaining money by false pretenses, though the amount is not large, is not a petty offense by any means. I would be willing to leave the entire matter of punishment to the board of parole and the governor. I am willing to assume that they have the same sense of duty as the court. We have the power to modify the judgment, still it seems to me the power ought to be exercised with caution. We ought not to assume too much the functions of the board of parole, the governor, the legislature, trial courts and trial jurors. A majority of the justices think the judgment should be reduced, and that it is their duty to determine whether the sentence shall be to the penitentiary or jail,

12. FALSE PRE-
TENSES: ex-
cessive sen-
tence: reduc-
tion.

and it is reduced to six months in jail. All points assigned and argued have been considered and we have noticed those in the opinion which seem to merit attention.

The motions for leave and to vacate the judgment are overruled. The judgment appealed from is—*Modified* and *Affirmed*.

LADD, EVANS, GAYNOR and SALINGER, JJ., concur in the result. WEAVER takes no part. DEEMER, C. J., agrees with PRESTON, J., that in this case the matter of punishment should be left to the board of parole or governor.

THE STATE OF IOWA V. ALFRED THOMAS, Appellant

HOMICIDE: When Manslaughter—Husband Killing Wife's Para-

1 **mour—Present Provocation—Evidence.** Evidence is not admissible, in order to reduce a homicide to manslaughter, that a husband killed his wife's paramour while he, the husband, was in a fury of high passion excited and instigated by the illicit relations, unless such offer of evidence is preceded by evidence that the provocation was present, that it was so recent that reason had had no reasonable time to take the place of high passion. If such reasonable time had elapsed beyond all reasonable doubt, then the court should exclude the evidence as a matter of law; if the court is in doubt, the safer course is to admit the evidence under proper instruction to the jury.

HOMICIDE: Self-Defense—Illicit Relations of Deceased with Wife

2 **of Accused—Hostile Motive.** Under a plea of self-defense, the accused should be permitted to show by a witness that he, the witness, had seen the deceased hugging and caressing the wife of the defendant and had reported such conduct to the defendant, because such evidence tends (a) to establish the existence of a hostile motive in the mind of deceased and (b) to show the apprehension of increased or greater danger on the part of defendant at the time of the fatal encounter.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

THURSDAY, MARCH 18, 1915.

THE defendant was convicted of murder in the first degree and appeals.—*Reversed and Remanded.*

H. W. Laton, for appellant.

George Cosson, Attorney General, and *Wiley S. Rankin*, Special Counsel, for the State.

LADD, J.—The accused discharged a revolver into and killed James William Ashley, August 8, 1914. This occurred at the home of deceased's son, H. A. Ashley, whose wife was sister of the wife of defendant. At the time the latter's wife and children were staying at H. A. Ashley's house and had been for three months last past. Mrs. Ashley testified that defendant came to the house and inquired of deceased why he did not let the children come out instead of motioning them back when they started; that deceased denied motioning them back, when defendant pointed his revolver at him and discharged it twice; that she then handed deceased a sabre, which hung in its scabbard on the wall; that he took it, went out, and later was found lying in the back yard. Her son, thirteen years old, testified: "I first saw Thomas right to the door there—I saw him to the front door and granddad inside of the house there. Granddad was inside of the house. He shot granddad when Alfred was outside and Granddad was in the house, in the kitchen door there. Alfred went into the kitchen. Then granddad went into the middle room and Alfred went into the other door, and shot granddad the last time. After he shot this last time he went outdoors and went around the house and went down the hill there and I didn't see him after that. I saw granddad go out of doors after Alfred left. Alfred had already gone. I don't think granddad had anything when he went out of doors. He did not have his sword. He was getting the sword when Alfred started to shoot him the first time. The sword was kept in the other room. Granddad got the sword after the

second shot. Saw my mother hand it to him. Thomas went out of the door about the time granddad got the sword."

On the other hand, the defendant testified that he went there for his children with the understanding that he could get them, "and when we went in the house my sister-in-law handed the old man this sabre, I told him, I says, 'don't do that, I didn't come here for trouble,' he says 'I am going to kill you.'"

Q. "Did he call you any names in connection with that?"

A. "Yes, he called me names."

Q. "Tell the jury what he said."

A. "Well, he called me a son-of-a-bitch, and I tried to get away from him, but could not."

State asks that that be stricken out as incompetent and a mere conclusion of the witness.

Court: "State what he did."

A. "And he struck at me and struck me the first time I got back just far enough so he cut my pants, and the next time he struck at me for to cut my head off, and of course I shot. I shot in self-defense. The last time I shot gave me a chance to get out of the house. I didn't know whether I had hit him or not and I got out and went home."

I. Counsel for defendant by various questions propounded to him sought to show (1) that his mind was inflamed at the time because of the improper relations between deceased and his wife and (2) that in consequence thereof, he was irresponsible for his acts. Objections thereto were sustained, the court intimating that if defendant had a grievance, redress elsewhere might be available. The law is well settled that if a man discovers another ravishing or attempting to ravish his wife and kills him, he is justified therein as fully as the wife herself would have been had she killed him. *State*

1. HOMICIDE:
when man-
slaughter:
husband killing
wife's para-
mour: present
provocation:
evidence.

v. Neville, 51 N. C. 423; *Staten v. State*, 30 Miss. 619. So, too, the husband may when necessary resort to force in order to take his wife from the possession of another in whose company he finds her if he has reason to believe they have committed immediately before or are about to commit adultery. *State v. Craton*, 28 N. C. (6 Ire. L.) 164; Wharton's Crim. Ev. Sec. 933. If the husband discovers another in the act of adultery with his wife, he is not entirely justified in taking his life, but the offense is thereby reduced to manslaughter. Says Mr. Bishop in 2 Bish. Crim. L. Sec. 708: "If a husband finds his wife committing adultery, and provoked by the wrong, instantly takes her life or the adulterer's . . . the homicide is only manslaughter. But if on merely hearing of the outrage he pursues and kills the offender, he commits murder. The distinction rests on the greater tendency of seeing the passing fact, than of hearing of it when accomplished, to stir the passions; and if a husband is not actually witnessing the wife's adultery, but knows it is transpiring, and in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer, the offense is reduced to manslaughter." See note to *Price v. State*, 51 Am. R. 322. The distinction between a case where the husband kills a person ravishing his wife and committing adultery is that the former offense is perpetrated by force, against which he may resort to force in protecting his wife the same as she might have done, while the latter is by her consent, and the offense is reduced to manslaughter, not to shield the wife, but owing to the provocation and passion engendered thereby in the husband. After sufficient time elapses to allow the blood to cool, the circumstance may not be shown in defense, for the law will not permit the wronged husband to take the law into his own hands and wreak vengeance on his wife's paramour. Wharton on Homicide, Sec. 188; *State v. Bone*, 114 Iowa 537; *State v. Hockett*, 70 Iowa 442.

Homicide is extenuated to manslaughter, not by the fact that it was perpetrated in a fury of high passion, but by such

fury being excited by present provocation, which the law deems sufficient for the time to deprive men in general of that power of reason and reflection which ought to lead them to appeal for redress to the law, which provocation prompts them to take the law into their own hands. *Maher v. People*, 10 Mich. 212 (81 Am. D. 781); *State v. John*, 5 Jones (N. C.), 163 (49 Am. D. 396). See 21 Cyc. 751 et seq. and citations. *Shufflin v. People*, 62 N. Y. 229 (20 Am. R. 483).

Says Foster in his Crown Law, page 296: "A husband finding a man in the act of adultery with his wife and in the first transport of passion killeth him; this is not more than manslaughter. But had he killed the adulterer deliberately and upon revenge, after the fact and sufficient cooling time, it had been undoubtedly murder. For let it be observed that in all possible cases, deliberate homicide upon a principle of revenge, is murder." Where the want of provocation is so clear as to admit of no reasonable doubt that the alleged provocation could not have had any tendency to produce such state of mind in ordinary men, the evidence thereof should be excluded; but if there be a reasonable doubt as to whether the alleged provocation had such tendency, it is the safer rule to let the issue go to the jury under proper instructions. Of course, the reasonableness or adequacy of the provocation must depend on the facts of each particular case. In some cases, the courts declare that only actual personal knowledge of the wife's infidelity will extenuate the crime of killing by the husband to manslaughter. See *State v. Neville, supra*. But others with better reason hold that information of the recent liaison of the wife with a paramour, reaching the husband for the first time, may be shown as likely to have thrown him into ungovernable passion. See *Maher v. People*, 10 Michigan 212 (81 Am. D. 781). The circumstances of each case necessarily must determine the admissibility of the evidence as well as its bearing on the different issues presented. Again, it is to be remarked that there is no definite time within which the passions when aroused by such a wrong may be said to have

so far subsided and reason to have resumed its sway to such an extent as that thereafter the killing may be denounced as in vengeance alone. The question is one of reasonable time and dependent on all the facts of the case. While the time may be so long as to exclude all doubt on the subject and exact the exclusion of the evidence in so far as offered in extenuation, more frequently it should be submitted to the jury under proper instructions. *Maher v. People, supra*. The contention then of counsel for defendant that the latter had the right to kill deceased if unduly intimate with his wife is without foundation, and in order to show that defendant was in a condition such that the killing would be manslaughter only, the evidence must be such as to bring it within the rules suggested. Until that had been done and a sufficient provocation shown, it was not material whether defendant's mind were inflamed or the influence exerted thereon.

2. HOMICIDE :
self-defense :
illicit rela-
tions of de-
ceased with
wife of ac-
cused : hos-
tile motive.
- II. Frank Ashley was called as a witness and after saying that he was a son of deceased and acquainted with defendant was asked :

Q. "You may state to the jury whether you ever reported any misconduct that you saw to the defendant, Alfred Thomas, between your father and his wife?"

Objected to as incompetent, immaterial to any issue in this case.

Sustained.

Q. "You may state to the jury whether or not you ever saw your father caressing and hugging this man's wife and reported the same to the defendant."

Objected to as incompetent, irrelevant, immaterial to any issue in this case.

Sustained.

The rulings were erroneous. The evidence in behalf of the state made out a prima-facie case of unprovoked murder. To meet this a plea of self-defense was interposed, in support

of which defendant had testified that deceased, after applying to him opprobrious epithets, assailed him with a sword and that he discharged his revolver to save his own life.

This evidence tendered tended to establish the existence of a hostile motive in the mind of deceased and to show the apprehension of increased or greater danger in that of appellant. Without such evidence, the jury could not know as the defendant did the attitude of deceased's mind toward him nor would they be in a situation to view the acts of deceased from his viewpoint. Such testimony would have thrown light upon the motive or purpose actuating deceased in what he said or did and also upon the conduct of the defendant upon the occasion and the motive which actuated him in killing the deceased. The phase of the evidence adduced by defendant having presented a case of self-defense, it was competent for him to go farther and with this as a predicate, strengthen it by showing that deceased by his own previous conduct, whatever that might have been, if it had such tendency, not only evidenced an evil purpose toward defendant, but that defendant was aware of this, and was likely in their relations one with the other to have that in mind when dealing with him. The principle hardly requires precedent for its support, but in *Gafford v. State*, 122 Ala. 54, the precise question arose. There the deceased had been unduly intimate with the defendant's sister and in reversing the ruling by which evidence thereof and of defendant's information was excluded, the court said that if improper relations between defendant's sister and deceased then existed and "had existed for a considerable length of time previously, it may well be that the jury from their knowledge of human nature, and the history of like cases, might, in the light of such testimony, have inferred a motive on deceased's part to remove a dangerous obstacle out of the way of his illicit enjoyment. However that may be, such testimony would have shown the cause of the enmity of the deceased towards the defendant, its intensity, and would have tended to show a reasonableness of defendant's apprehension of danger of death

or serious bodily harm from the attack made upon him by deceased if the jury should believe that such an attack was made. We are at all events persuaded that with the testimony referred to before them, the jury would have been enabled to balance more justly the substantial merits of the question of self-defense by reason of a fuller and juster apprehension of the defendant's real position at the critical moment of the fatal encounter, and the real state of feeling then existing on the part of each. It is proper, however, for us to observe, that with this testimony in, it would, nevertheless, still be the duty of the jury to inquire whether or not, in view of the provocation, and the state of feeling between the parties, and other attending circumstances, the words or conduct of deceased at the time of the *rencontre* were seized upon by defendant as a pretext to execute a previously formed design to take the life of deceased."

Such evidence may also disclose a motive on the part of the accused, but this does not justify its exclusion. It is for the jury to determine the weight which shall be accorded it in passing on the different phases of the case on which it has any bearing. See *State v. Shelton*, 64 Iowa 333. The court erred in sustaining objections to the questions propounded.—*Reversed and Remanded*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

JAMES TIMONDS, Plaintiff, v. FRANCIS M. HUNTER, Judge,
Defendant.

APPEAL AND ERROR: Record on Appeal—Matters de Hors—

- 1 **Waiver of Jury.** Whether a party has waived his right to a jury must be determined from the record made in the court below, unaided by affidavits adding to or subtracting from such record.

JURY: Right to—Waiver Under Statute—Construction of Record.

- 2 **Right to jury** may be waived by implication, but it will require a clear case. Doubts will be resolved against the waiver. *Held*, the record failed to show a waiver.

CERTIORARI: When Action Will Lie—Refusing Jury in Guardian-ship Proceedings—Inadequacy of Appeal. Certiorari will lie to correct the action of the lower court in denying to defendant a right to a jury trial in a proceeding wherein the appointment of a guardian for defendant is sought on the ground of defendant's mental incapacity. To deny the defendant a jury in such a proceeding is an "illegality," and appeal affords no adequate relief.

DEEMER, C. J., and SALINGER, J., dissent.

Certiorari from Wapello District Court.—HON. FRANCIS M. HUNTER, Judge.

THURSDAY, MARCH 18, 1915.

CERTIORARI proceeding brought in this court to test the legality of the action of the district court of Wapello County (the defendant judge presiding) in the case of Goudy v. Timonds pending in such court. The alleged illegality complained of is that the defendant judge denied the petitioner herein (defendant in that case) the right of trial by jury and refused to call the jury in such case upon the petitioner's demand therefor and compelled a hearing of the case before the court without a jury.

Roberts & Webber, for plaintiff.

Jaques & Jaques and *Tisdale & Heindel*, for defendant.

EVANS, J.—The case of Goudy v. Timonds was a proceeding brought in the Wapello county district court under Secs. 3219 and 3220, whereby it was sought to have a guardian appointed for the defendant therein on the ground that he was of unsound mind. The petitioner herein is the defendant therein and his daughters are the plaintiffs therein. The petition was filed on January 8, 1914. An order appointing a temporary guardian was entered without notice. The case was brought for the March term of court, to begin March 23rd. On January 16th, the defendant therein filed a motion to set

aside the order of temporary guardianship. At the same time, he filed his petition in an equity suit brought by him against the plaintiffs in the guardianship proceedings, whereby he sought to enjoin the plaintiffs from prosecuting such guardianship proceedings. He also prayed for a temporary injunction. On January 17th, Judge Anderson, then holding the January term, entered an order fixing January 22nd as the time for hearing the application for temporary injunction. On January 19th, the parties by their attorneys appeared in open court and before Judge Hunter, who was then presiding for Judge Anderson, agreed to the following order, which was entered of record:

“Be it remembered that on this 19th day of January, A. D. 1914, by agreement this cause is to be tried to the court, Hon. F. M. Hunter, Judge, on a date to be hereafter named by him. Testimony of James Timonds to be taken before said Judge January 24, 1914, and the testimony so taken shall be used in the case James Timonds vs. Nora Goudy et al.”

On January 24th, Judge Hunter was unable to be present. Thereupon, upon such date, the court continued “all matters pending herein” to the March term. In the early part of the March term, the attorneys for the defendant therein asked that another date be fixed for the taking of the testimony of Timonds. Thereupon, April 6th was fixed as “the time for taking the testimony of said James Timonds.” In pursuance of this order, the testimony was taken on such date. Under the order of the court, the jury for the March term was called for April 27th. On April 21st, the assignment of jury cases was made. At the time of such assignment, the defendant Timonds demanded a jury trial and asked that his case be assigned accordingly. This demand was resisted by the plaintiffs. The court did not definitely rule upon the question, but assigned the case for trial for May 11th. On May 11th, the defendant again demanded a trial by jury. This demand was finally denied and the defendant was required to proceed

to trial before the court without a jury. After the hearing of the evidence and after an expression of opinion thereon by the trial judge, but before any judgment was entered therein, the defendant sued out the writ herein to test the legality of the action of the court and obtained a restraining order whereby the district court was restrained from entering judgment until this proceeding could be heard. Because of such restraining order, no judgment has been entered in such case.

Two questions are involved in the case as made upon this record:

(1) Did the trial court err in denying the defendant jury trial?

(2) Is the remedy of certiorari available to such defendant to cure such error or illegality, if any?

Of the two questions stated, the second is the more difficult. Its consideration can only become necessary if we find in the affirmative on the first question and we proceed to this inquiry.

The ground of resistance to the defendant's demand for a jury was two-fold:

(1) That by the agreement of January 19th, the defendant had waived a jury.

(2) That the taking of the testimony of Timonds on April 6th was a beginning of the trial and that the demand for a jury therefore came too late.

Both of these grounds were ultimately sustained by the court and the refusal of a jury was based thereon. We have already set out the agreement entered of record January 19th.

1. **APPEAL AND ERROR:** record on appeal: matters de hors: waiver of jury. Some extraneous evidence has been included in the record in the form of affidavits which purport to aid such record either by adding to it or taking from it, but we think the record must speak for itself. The agreement referred to was made by attorneys. It is the policy of the law that such agreements shall not be left open for future cavil, and ordinarily the same

must be reduced to a signed writing or entered upon the records of the court. Code, Sec. 319.

In construing this entry, perhaps it ought to be borne in mind that, so far as the main guardianship proceeding was concerned, it was not at issue. The answer was not due until the second day of the March term and no answer was on file. The same is true of the equity case. There was pending, however, a motion to discharge the temporary guardian in the one case and an application for a temporary injunction in the other. One or both of these had been previously set for hearing on January 22nd. Of course no right of jury trial was involved upon the hearing of either of such applications. The order contains no reference to a jury nor does it purport to contain a waiver of jury trial unless that is the necessary effect of the order as made. If the order had related to nothing but the method of trial, there would be more force in saying that its necessary effect was to waive a jury. But the order involved an agreement to try the case before Judge Hunter, who was not the regular judge holding that term. It authorized him to fix a date of trial. It also provided for the taking of the testimony of Timonds on January 24th. It appears from the defendant's return herein that the attorneys for Timonds in the guardianship proceeding were anxious to reach an immediate trial because of the uncertain tenure of life of their client, he being then eighty-six or eighty-seven years old and in feeble health. This solicitude on their part is practically conceded. If, in the light of this fact, the record should be construed as an agreement for an immediate trial without a jury, yet the provision for an immediate trial failed. No hearing was had at the January term, although it continued to March 14th, nor was the testimony of Timonds then taken. At the March term, the main guardianship proceeding was put at issue and assigned for trial in the ordinary course. If this agreement, therefore, could be construed as a waiver of the jury for the purpose of an immediate trial at the January term, it affords no ground for holding such waiver appli-

cable to the succeeding term. We are clearly of the opinion, therefore, that there was nothing in the agreed order of January 19th which precluded either party from demanding a jury at the March term.

It remains to consider whether the trial of the case was actually begun on April 6th as contended. When Timonds appeared for the taking of his testimony on April 6th, the respective attorneys undertook to show of record the arrangement under which such testimony was to be taken. The record then made by the reporter was the following dialog:

Senator Webber: "It is agreed between both parties, all of the parties in the above cases to wit: the case of James Timonds vs. Nora Goudy et al., and Watson Enyart, Guardian, and the case of Nora Goudy et al., plaintiff, vs. James Timonds, defendant, that the testimony or evidence given by James Timonds, the plaintiff in the first case and the defendant in the second, that the evidence shall be heard as his deposition in both cases to be tried in the future.

Judge Tisdale: "Strike that out, I can beat it. Now it is agreed in these cases that the testimony of James Timonds taken today may be used on the trial of the above—of both of these proceedings, to wit: Nora Goudy et al., vs. James Timonds, and James Timonds vs. Nora Goudy et al., Watson Enyart, Guardian, and this is the beginning of the trial of the two cases heretofore consolidated by order of the court and a jury waived in the probate case.

Senator Webber: "I do not believe our preference would be in having the testimony of James Timonds at this time be taken, it is more in the nature of a deposition agreed to by both parties.

Judge Tisdale: "This is the beginning of the actual trial of the cases.

Chester Whitmore: "Are you making him your witness?

Judge Tisdale: "No, sir. This is not a preliminary matter, this is the beginning of the trial of these cases, we were

to take his testimony to accommodate you, it is not in the nature of a deposition, but testimony in open court in the trial of the two cases; if Your Honor will turn to the docket you will find—

Senator Webber: "We want to take his deposition.

Judge Tisdale: "There is no agreement to take his deposition, they wanted me to go out and I declined and they got it set down here before the court. They wanted me to go out to take his testimony, but I declined.

Chester Whitmore: "Well, go ahead, make him our witness in the two cases, let us proceed."

It will be noted that Judge Tisdale was representing the plaintiffs and Senator Webber and Mr. Whitmore were representing the defendant. Judge Roberts, who represented the defendant on January 19th, was not present on this date. It will be noted from the foregoing dialog that it ended where it began and settled nothing. The controversy at this point simply involved a construction of the agreement of January 19th. The date of January 24th having failed because of the inability of the judge to be present, he fixed the later date of April 6th. The agreement of January 19th speaks for itself. Its provision was that the date of trial was to be "hereafter named" by the judge. But the "testimony of James Timonds" was "to be taken January 24th, 1914." Manifestly, the agreement of January 19th did not contemplate that the taking of the testimony of James Timonds should be the beginning of the trial. So far, therefore, as the colloquy between the respective counsel above set forth is concerned, the attorneys for the defendant were clearly right in their construction of the order under which the testimony of Timonds was to be taken. And this conclusion is consistent with the record of the court as actually made on succeeding dates. The record entries show that on April 21st, the case was assigned for May 11th; that on May 11th, the trial was begun. There is no record entry which purports to say that the trial

was begun on April 6th. To hold, therefore, that the trial began on April 6th because of the taking of the testimony of Timonds is to contradict the only record entry on the subject,—that the trial began on May 11th. It should be noted here that the equity case was dismissed on April 21st.

We do not overlook the fact that, on May 12th, the trial court expressed the view that the trial began with the taking of the testimony of Timonds on April 6th and thus substantiated the contention of the plaintiffs, and that the opinion so expressed was taken down by the shorthand reporter and is incorporated as a part of the return.

This ruling, however, only purported to be a construction of the court's previous records and not a correction of any record. When the ruling was made on May 12th, the record had already been made that the trial began on May 11th. This was consistent with the court's record for April 6th, there being no trial record entered for this date in such case.

On the general question of waiver of jury, we have the following statutory provision (Code, Sec. 3733):

“Trial by jury may be waived by the several parties to an issue of fact in the following cases:

“1. By suffering default or by failing to appear at the trial;

“2. By written consent, in person or by attorney, filed with the clerk;

“3. By oral consent in open court, entered in the minutes.”

We have held that a jury may be waived also by going to trial without objection and without demand for a jury. *Saum v. Jones County*, 1 G. Gr. 165; *Davidson v. Wright*, 46 Iowa 383. It is in accord with the weight of authority that even an express waiver of a jury at one trial of a case is not necessarily operative as a waiver of a jury on a subsequent trial. *Cochran v. Stewart*, 68 N. W. (Minn.)

972. And this is especially true where the first waiver was by implication only. *Schumacher v. Crane*, 92 N. W. (Neb.) 609. Even a stipulation of the parties is to be strictly construed in favor of the right to a jury and a waiver is not to be lightly inferred by implication. *Wittenberg v. Onsgard*, 81 N. W. (Minn.) 14. We have held that what might have been a sufficient waiver by implication at one term cannot be regarded as such at a subsequent term. *Smith v. Redmond*, 141 Iowa 105.

Turning to the record herein, if the record entry for January 19th disclosed a waiver of the jury in the trial of the main case, it was such by implication only. True, if the parties had come to trial without demanding a jury, a waiver would be implied. But they did not. No provision of Sec. 3733 was complied with. If the record entry could be aided by a showing of the exigencies of the time and the desire of the parties for an immediate trial, this would furnish no fair reason for extending the implication of a waiver to the subsequent term.

It is clear, also, that the order of January 19th did not contemplate that the date of taking the testimony of Timonds should be deemed as the date of the beginning of the trial. An express date was fixed for the taking of such testimony, while the date of the beginning of the trial was expressly left open, to be determined later.

The conclusion is unavoidable, therefore, that the defendant was entitled to demand a jury at the succeeding term; that his demand therefor on April 21st, when the assignment for the term was being made and when this case was assigned for May 11th, was timely. This demand being repeated and insisted upon when this case was reached for trial on May 11th, the refusal of the demand was not warranted under the statute.

II. This brings us to the necessary consideration of the more difficult question whether the error of the court was an

illegality for which no other plain, speedy and adequate remedy is provided within the meaning of Sec. 4154. We have held repeatedly that where there is no excess of jurisdiction and where the illegality is merely an erroneous conclusion for which an adequate remedy is provided by appeal, a writ of certiorari will not lie. The line of demarcation between a merely erroneous conclusion and an illegality for which no other adequate remedy is provided cannot be very exactly defined. In *Butterfield v. Treichler*, 113 Iowa 328, a jury trial was erroneously permitted (as was held later in *Porter v. Butterfield*, 116 Iowa 725). We held, however, that the remedy by appeal was adequate and that the writ of certiorari would not lie to correct such error. It is urged with force that such holding is decisive of the present question; that is to say, if the writ will not lie to correct an order erroneously granting a jury trial, it cannot lie to correct the converse order erroneously refusing a jury trial. It is urged that in either event a merely erroneous conclusion was involved and no more. It is generally true that illegality or excess of jurisdiction, if any, is necessarily preceded by an erroneous conclusion. If the erroneous conclusion results in an illegality within the meaning of Sec. 4154, then there is an illegality and not *merely* an erroneous conclusion. The right to a jury trial in this case was an explicit statutory right. The defendant was deprived of it as effectively as if the refusal had been arbitrary. In *State v. Carman*, 63 Iowa 130, it was held that the district court had no jurisdiction to try a criminal case without a jury. In that case, the defendant had expressly waived a jury. This court held, however, that there was no statutory provision authorizing the defendant to waive a jury and that such waiver was, therefore, ineffective. The reasoning in that case is not necessarily applicable to a civil case, but it comes close to the general question whether the trial judge has power to try a jury case without a jury in the face of a demand for a jury. It

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is clear that he has no statutory authority to do so. It is also clear that the statute gives to either litigant the express right to a jury trial. The necessary effect of this provision is to withhold from the trial judge the power or authority to try the issues of fact in the case except by the consent of the litigants, either express or implied. In a broad sense, the court had jurisdiction both of the parties and the subject-matter. This jurisdiction was not defeated by mere errors. In a sense, also, the trial judge is the court. He is its head and its hand. In a jury case, however, the jury is also a part of the court. Its function is well defined. Its power to determine issues of fact upon conflicting evidence is the power of the court to that end. That power can be exercised by the trial judge in a jury case only by the consent of the parties, either express or implied. To refuse a proper demand for a jury and to exercise the jury power over the objection of the demanding litigant is an exercise of power by the trial judge beyond the provision and contemplation of the statute. If this was not an illegality within the meaning of Sec. 4154, then it would be difficult to apply the term to anything less than a defeat of jurisdiction. We reach the conclusion that the action complained of was such illegality.

III. For this illegality, had the defendant any other plain, speedy and adequate remedy? The only other remedy available to the defendant would have been by appeal. In order to render such remedy available at all, he must first submit to adverse judgment. The effect of such judgment would be to fix his status as a person of unsound mind. Theoretically, this proceeding is not adverse. It is prosecuted for the supposed benefit of the defendant himself. No one other than the defendant has a legal interest in the result. And yet the correctness of the result is of the highest importance to the defendant. A judgment making the guardianship permanent puts him under disability as a *non compos mentis*. It not only deprives him of the present control of his property but it renders him presumptively incapable, and perhaps conclusively

so, of entering into any contract or making any testamentary disposal of his property. The defendant is eighty-seven or eighty-eight years old. His health is impaired and his expectancy of life is very brief. An adverse judgment would fix his status, for the time being. He could not supersede it pending the appeal. If he should die before his appeal could be heard and determined, it is doubtful at least whether his appeal would not be abated thereby. The result would be to leave his status as fixed by the judgment at the time of his death.

On this branch of the case, the court is divided in opinion. As indicated in the dissent filed herewith, the minority think that the writ of certiorari is not available to the plaintiff. The majority reach a contrary conclusion. We recognize the fact that the ground is narrow, but we are convinced that it comes within the call of the statute. The illegality is unmistakable. The remedy by appeal is not available to him for want of judgment and cannot be available to him until after judgment.

As rehearsing the ground of our holding, therefore, we are disposed to emphasize the following recapitulation:

(1) The right of the defendant to a jury upon his demand was explicit and unmistakable. It was not dependent upon the finding of any disputable fact. The judge lacked statutory power to try the case without a jury without the consent of the defendant, either express or implied. There was no consent. There was insistent demand for the jury. The refusal of a jury in the presence of this demand was the equivalent of an arbitrary refusal, though not intended as such. It was not a legal exercise of the judicial power to hold that a demanding litigant was consenting contrary to his demand.

(2) The remedy by appeal cannot become available to the defendant unless he first submits to an adverse judgment and thereby loses his status as a *compos mentis*. This loss of status is an important consideration as bearing upon the ques-

tion of whether the remedy by appeal is adequate. It cannot be superseded by bond or otherwise. It will operate to his immediate disability. This will not only deprive him of the dominion of his property but it will render him helpless to make any disposal of the same either testamentary or otherwise. It is at least doubtful whether the proceedings could be reviewed at all if his death should occur before such review were had.

(3) There is no party in interest in the guardianship proceedings except the defendant. They are both prosecuted and defended for his benefit alone. No other party has any interest adverse to him. No one can be wronged by the granting of plenary remedy to him.

In brief, therefore, we think that the defendant is entitled to maintain his status as presumptively *compos mentis* until the jury which he has demanded shall find otherwise.

That the peculiar circumstances of the particular case may be considered as bearing upon the question of the adequacy of the remedy by appeal was held in *Voting Machine v. Hobson*, 132 Iowa 38.

We think it must be said, therefore, that an appeal would furnish the defendant no remedy against the immediate disability to which adverse judgment must subject him. It is therefore not adequate. The writ issued herein must be sustained and the order complained of annulled.—*Annulled*.

LADD, PRESTON, and GAYNOR, JJ., concurring; DEEMER, C. J., and SALINGER, J., dissenting; WEAVER, J., not sitting.

DEEMER, C. J. (Dissenting). Certiorari will not lie unless it be alleged and shown that the tribunal has exceeded its proper jurisdiction or otherwise acted illegally; and it must also appear that there is no other plain, speedy and adequate remedy. Code Sec. 4154. It will never lie to correct an error, but is only to test the jurisdiction of the tribunal and the legality of its acts. *State v. Roney*, 37 Iowa 30.

Where a party has the right of appeal, he cannot, as a

rule, proceed by certiorari. *Ransom v. Cummins*, 66 Iowa 137; *State v. Schmidt*, 65 Iowa 556. Therefore when a court, in the exercise of its jurisdiction, proceeds regularly and according to the usual course of procedure, the action will not lie, no matter how erroneous its decision. In the case now under consideration, there is no question regarding the jurisdiction of the court and it does not appear that it acted irregularly or departed from the usual course of procedure; or that its acts were in any way illegal, save that it came to a wrong conclusion upon the evidence adduced, and made an erroneous ruling.

There was consequently no irregularity or illegality in its proceedings. Little difficulty arises when the question involves the matter of jurisdiction or of excess thereof.

The only question of doubt in any of these cases, as a rule, is whether or not the action of the court is illegal, as that term is used in the statute. Our previous pronouncements upon this question are very clear. For example, in *Eels v. Bailie*, 118 Iowa 519, the court said: "It is fundamental that a writ of certiorari is never used to correct a mere error, but only to test the jurisdiction of the tribunal and the legality of its action. If the mistake complained of was a mere matter of judgment the writ will not ordinarily lie; for the tribunal guilty thereof is not acting illegally. Sec. 4154 of the Code also provides that the writ should not be granted when there is another plain, speedy, and adequate remedy. Under this section it has frequently been held that the writ should not be granted where the error complained of can fully and speedily be corrected by appeal. *State v. Schmidt*, 65 Iowa 556; *Ransom v. Cummins*, 66 Iowa 137; *Remey v. Board*, 80 Iowa 470; *Oyster v. Bank*, 107 Iowa 39. . . . Both defendants had jurisdiction to pass upon these motions, and the error, if any, was a mere mistake of judgment, which cannot be reviewed in this action. Plaintiff invoked the jurisdiction, or rather the action, of the district court over which defendants preside, asked it to pass upon his motion to dismiss, and is now complaining of the rulings denying his motion. This is all there

is to the case as it is presented to us. Manifestly, the court, and the defendants as the presiding officers thereof, had the right, and it was their duty, to pass upon those motions to dismiss; and, if they erred, it was an error of judgment, from which an appeal may be taken in a proper case. But they were not without jurisdiction, nor were they acting illegally in overruling the motions. Concede that their actions were erroneous, it does not follow that they were acting illegally, for as pointed out in the case first cited, if the mistake is one of judgment merely, about a matter on which defendants had a right to pass, their actions were not illegal. . . . When it is once conceded—as it must be—that defendants, as judges, had the right to pass upon plaintiff's motion, the case is determined; for it follows that they had jurisdiction, and did not act illegally, as that term is used in law. This is made plain by the authorities heretofore cited. See, also, *Davis Co. v. Horn*, 4 G. Greene 94, and particularly *Fagg v. Parker*, 11 Iowa 18, where it is said: 'It is no part of the office of the writ of certiorari to correct every alleged error of judgment in judicial tribunals which parties claim take them by surprise. Nor, again, does this writ issue to correct an error, where the party has lost the plain, speedy, and adequate remedy pointed out by law by his own fault and negligence.' . . .

"In *Sunberg v. District Court, Linn County*, 61 Iowa 597, it is said: 'The order in the district court transferring the cause to the United States court was within its jurisdiction. While the order may have been erroneously made, it cannot be claimed that the court exceeded its jurisdiction. The petition does not show that the court acted illegally; that is, that its proceedings were not in accord with law, in transferring the case. The real ground of complaint is that the court erred in substituting new defendants in the action. If they had been regularly and lawfully substituted, there would have been no irregularity or error in transferring the case. The order to that effect cannot, therefore, be reviewed upon certiorari, for

the court in making it did not exceed its proper jurisdiction, or otherwise act illegally.' "

Again, in *Butterfield v. Treichler*, 113 Iowa 328, the court said: "The writ of certiorari is never used to correct a mere error, but only to test the jurisdiction of an inferior tribunal. *State v. Roney*, 37 Iowa 30; *Ransom v. Cummins*, 66 Iowa 137. The trial court clearly had jurisdiction to rule on these matters."

In *Darling v. Boesch et al.*, 67 Iowa 702, the court said: "The writ of certiorari is granted when the inferior tribunal, board or officer, is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally (Code ['73] Sec. 3216) and it cannot be said that the board has acted unlawfully because it erred in the determination of a question which it was required to determine in the proceeding."

In *Finn v. Winneshiek District Court*, 145 Iowa 157, we said: "Certiorari is, or may be, an original proceeding in this court, and may be brought in all cases where an inferior tribunal, exercising judicial functions, is alleged to have exceeded its proper jurisdiction, or otherwise acted illegally, and there is no other plain, speedy, and adequate remedy. Code, Sec. 4154. It is not intended to supplant the ordinary remedy of appeal, and will not lie to correct rulings of an inferior tribunal which are simply erroneous. *State v. Roney*, 37 Iowa 30. Where a party has a right of appeal he cannot ordinarily proceed by certiorari: *Ransom v. Cummins*, 66 Iowa 137; *State v. Schmidt*, 65 Iowa 556; *Wise v. Chaney*, 67 Iowa 73. . . . These were each and all matters which might have been corrected on appeal, and the order requiring plaintiff to answer each and all of the cross-interrogatories, etc., was at most erroneous and not illegal. The distinction between an erroneous and an illegal order is well pointed out in *Tiedt v. Carstensen*, 61 Iowa 334, where it is said:

" 'We are, therefore, only to inquire, when is a tribunal

“acting illegally” in the contemplation of the statute? When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would, therefore, act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal. If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties are within its jurisdiction, for the law entrusts the decision to the discretion of the tribunal.’ ”

Again the question was before the court, in *Iowa Loan and Trust Co. v. District Court*, 149 Iowa 66, and we there stated: “The question presented by the writ is whether the defendant exceeded his jurisdiction, or otherwise acted illegally. If his action was merely erroneous, a writ of certiorari will not lie. The distinction between an erroneous order and an illegal one is thus stated in *Tiedt v. Carstensen*, 61 Iowa 334: ‘When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would therefore act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal. If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject matter, and the parties are within its jurisdiction, for the law entrusts the decision to the discretion of the tribunal.’ See also *Wise v. Chaney*, 67 Iowa 73; *Medical College Assn. v. Schrader*, 87 Iowa 659; *Voting Machine Co. v. Hobson*, 132 Iowa 38; *Finn v. District Court*, 145 Iowa 157.”

It is true that Judge Evans dissented from the conclusion in this case, but the rule has several times been reaffirmed since the filing of that opinion. See *Witmer v. District Court, Polk County*, 155 Iowa 244, where the doctrine was reannounced, and as said in the last cited case: "Indeed, the general proposition that an erroneous ruling of a court in a proceeding of which it has jurisdiction cannot be reviewed on certiorari has so often been announced that further citation of authorities would not be justified."

Still later, in *Hatz v. Hutchinson, J.*, 168 Iowa 141, the court, speaking through Evans, Justice, said: "If the court had jurisdiction to hear the appeal, it could not avoid the question thus presented to it. If it had jurisdiction to count the names as a part of the petition, it necessarily had the same jurisdiction to reject them as having been withdrawn. If it be assumed that the petitioners were right in their contention before the district court that the names in question ought to have been counted as part of the petition of consent, the contrary finding by the district court was only an erroneous conclusion and was not an 'illegality' in any other sense."

The rule has been announced in a variety of cases and has never been departed from, so far as I have been able to discover. *C. B. & Q. R. R. v. Castle*, 155 Iowa 124, is not a departure from the rule because the court expressly found that the order there reviewed was in excess of the court's jurisdiction, and that it imposed a penalty which was not only erroneous, but irregular and illegal.

The rule has been applied in a variety of cases. For instance:

In an action where an order on a petition for a removal of the cause to the federal courts was involved, the court having erroneously ordered a transfer to the federal court, it was held that the action could not be reviewed by certiorari. In one of the cases, it was held that the erroneous dismissal of an appeal from a justice's court to the district court could not be reviewed on certiorari.

In several cases it was held that the erroneous exclusion of testimony, or an order for the production of books or papers, a motion for a change of place of trial, and various other matters, could not be reviewed, save that the court was without, or acted in excess of, its jurisdiction.

In a recent case, it was held that an erroneous order denying a change of venue could not be reviewed on certiorari. *Barry v. Court*, 167 Iowa 306. See also, as sustaining the doctrine I have announced: *Ferguson & Son v. Town*, 119 Iowa 338; *State v. Parker*, 147 Iowa 69; *Ransom v. Cummins*, 66 Iowa 137.

In the latter case it is said: "The justice of the peace had jurisdiction of the cause and of the parties. He had jurisdiction to determine every question of which plaintiff complains. If his rulings were erroneous, the plaintiff had a plain, speedy and adequate remedy by appeal. He would have been entitled upon appeal to make an application for a change of venue, and to challenge jurors, and to a verdict in proper form."

It is very clear to my mind that the trial judge in this case had jurisdiction and that the most that can be said of his order is that he erred in his conclusion, either in his finding of facts or in his conclusion of law. He did not act illegally nor were his proceedings irregular. He had full jurisdiction of both parties and subject-matter, and it will not do, I think, to say that if erroneous conclusions result in illegality, then there is illegality, and not merely an erroneous conclusion. This, to my mind, is reasoning in a circle; otherwise all erroneous conclusions are illegal, and this is manifestly not true. A case much like this one is *Butterfield v. Treichler*, 113 Iowa 328, wherein it was held that the writ of certiorari would not lie because the court erroneously directed a jury trial in a case where such was not permissible. I can hardly understand the logic of an opinion which holds that, if a jury trial is denied where the parties are entitled to it, then they are entitled to a writ of certiorari to review the ruling; whereas,

if granted when they are not entitled to it, such writ will not lie.

I feel that this opinion, if adopted by the majority, is an overruling of the Butterfield case. That case has so many times been followed and adopted and the doctrine upon which its is based is so well settled in this court that I do not think it opportune to overrule it.

Much more might be said in support of my conclusions, and many cases cited, not only from this court, but from other jurisdictions sustaining the rules I have announced; but I shall not do more at this time than to quote from a learned opinion of the Louisiana court, as follows:

“The functions of a certiorari are simply to ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of the law have not been observed, or on that of the want of jurisdiction in the court entertaining them. They have never been to inquire into the correctness of the judgment rendered where the forms of the law have been followed, and where the court had jurisdiction, and was therefore competent. Hence it has been held that the supervisory jurisdiction of this court, under a certiorari, must be restricted to an examination into the external validity of the proceedings had in the lower court. It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case. The supervisory powers of the court must not be confounded with its appellate jurisdiction. In the case referred to the district court had jurisdiction, and the proceedings are regular on their face. If the relator has the rights which he asserts, and if, by the refusal of the District Judge to recognize and enforce them, he is prevented from preparing his defense, and the matter is properly presented in the prosecution proceedings the same may be inquired into on an appeal, and justice can then be done.” *State ex rel. Matranga v. Marr*, 10 L. R. A. 248.

This is all so elementary that the majority do not dispute it, but seek to avoid it. It remains to be considered whether, indeed, the case at bar has anything that takes it out of the rule.

There was a resistance to the demand of the defendant for a jury, and the trial court was compelled to pass upon the merits of that resistance, and, as an incident thereto, on whether something had occurred earlier that operated as a waiver of jury trial; and some considerable reasoning is indulged in by the majority opinion as to whether what occurred operated as such waiver. It is admitted here that there is for consideration whether a trial was begun, and thereby objection to trial without jury came too late in view of the statutory provision that a jury may be waived by going to trial without objection and without a demand for a jury, and it is said by the majority that if a record entry made below discloses a waiver of jury in the trial of the main case, it was such by implication only.

Conceding, for the purpose of this dissent, that, if a trial court arbitrarily denied a trial by jury where in reason no question could be and none was made as to the right to such trial, certiorari will lie, but does that meet a case where the original jury trial was fairly in contest and its contest submitted to the court and it decided it in a way that we think it should not be decided?

If the majority is followed to the logical end, then certiorari lies in every case where a trial by jury is denied when it should have been allowed. In some special proceedings such trial is and in others it is not granted. Motion to transfer either to law or to equity always involves whether there shall or shall not be a jury trial. Motions to direct a verdict present whether the court rather than the jury shall decide the cause. Is certiorari entertained to test the rulings in such matters as these just referred to?

Suppose the defendant does have but a short expectancy,

and is old and in poor health. Does this have bearing on whether an appeal is or is not a speedy and adequate remedy? So to hold creates a new definition. If it be correct, only strong, young men will be denied certiorari, while it will be entertained for the old and feeble. As none may know when death will come, appeal would never be to a certainty a speedy and adequate remedy.

Suppose an adverse judgment here would create the status of an incompetent, and that this might make complications in the event of death; how does that differ in principle from divorce, or a judgment that one has not been adopted, or an unrecognized illegitimate?

Why would not a suspensive writ pending appeal and advancing the submission of the cause give all the speed and adequacy, the existence of which denies the writ of certiorari?

SALINGER, J., concurs in this dissent.

W. C. BARBER, Appellant, v. KIRKWOOD HOTEL COMPANY
et al., Appellants.

INTOXICATING LIQUORS: Injunction—Serving at Hotel—What Constitutes Selling, Bartering, etc. The proprietor of a hotel neither "sells, barters, gives away or dispenses" intoxicating liquors within the meaning of Sec. 2382, Sup. Code, 1913, (a) by permitting guests to drink such liquors with their meals, which liquors they themselves brought to the hotel, or (b) by permitting the waiters to serve to guests liquors so brought to the hotel by the guests, or (c) by the unauthorized and forbidden act of waiters going out and buying liquors for guests, which guests sometimes paid for in advance and sometimes when the same was delivered, or (d) by the act of a tenant of the hotel going out and buying liquor for such guests, the proprietor keeping no liquors and deriving no advantage from such supplying of liquors, and, therefore, cannot be enjoined.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

FRIDAY, MARCH 19, 1915.

Suit to enjoin an alleged liquor nuisance resulted in the dismissal of the petition. The plaintiff appeals. *Affirmed.*

M. S. Odle, for Appellant.

Halloran & Starkey, for Appellees.

LADD, J.—The defendant corporation, of which Veitch is president and manager and Kane secretary, operates the Kirkwood Hotel in Des Moines, and connected therewith is a dining room or cafe on one side and two smaller rooms on the other, used for like purposes. The evidence disclosed that some of the customers when eating meals in these rooms drank beer and whiskey, but that the business of defendant was serving meals without these. Sometimes the customer brought the liquor with him, but oftener ordered it of a waiter who either went out and procured it elsewhere or had one Sharp, who had a taxicab desk in the lobby, procure it for him. Payment was sometimes made by the guest in advance and at other times when the liquor was brought to him. This was generally done through the head waiters, and those attending guests poured the beverage in the glasses. The only connection of Sharp with defendants was that of tenant. The waiters were instructed by defendant not to purchase liquors for guests but allowed to serve that brought in by them and it is to be inferred from the record that this accounts for Sharp's connection with purchasing. It also appeared that guests sometimes had bell boys go out and procure whiskey for them and bring it to their rooms, but this was contrary to the boys' instructions. No liquors were kept by the company or Veitch and no advantage derived by either from supplying it to guests and the only benefit derived therefrom by Kane was from purchases made at his saloon near by.

The contention of plaintiff is that defendants in what was

done violated Section 2382 of the Code Supplement, which, in so far as material, reads: "No one, by himself, clerk, servant, employe, or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, . . . or solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped."

Under the facts disclosed, it could not well be claimed that defendants sold, bartered or gave to another. If they did anything, it was by way of indirectly dispensing. We do not think they were doing even that much, either through waiters or bell boys. The case is clearly distinguishable from *Sawyer v. Frank*, 152 Iowa 341, where it was stipulated that the defendant served to his patrons intoxicating liquors and that he attended thereto personally. Here whatever liquor may have been purchased by employes directly or through Sharp and by them served at the tables or obtained by bell boys was procured contrary to the instructions and without the authority of defendants. True, they may have known that liquors were being drunk at the tables but there is not a particle of evidence tending to show that they were aware that this was other than that procured by guests, independent of any agency on their part. The case is like those cited in the dissenting opinions in *Sawyer v. Frank*, supra, holding that what was done does not constitute selling, bartering or giving under Sec. 2382 of the Code. See also *State v. Smith*, 135 Iowa 523. In *Stromert v. Johnson*, 144 Iowa 682, relied on by appellant, a permit to sell for medical purposes had been granted to a pharmacist; and so handling the trust as that a clerk unauthorized gained access to the liquors and sold therefrom was held to render him responsible for the illegal sale. However, Sec. 2401 of the Code declares permit holders responsible for sales by clerks, and this would be another

ground for that holding. As the defendants were not guilty the petition was rightly dismissed.—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

TELLA MCCOY, Appellant, v. WILLIAM V. FLYNN et al.,
Appellees.

ATTACHMENT: Property Subject to—Property Under Administration. Property of a deceased in the possession of his duly qualified administrators is not subject to attachment.

CONTRACT: Restraint of Marriage. A contract in unreasonable restraint of marriage is against public policy and invalid.

PRINCIPLE APPLIED: The contract in question was alleged to have been in settlement of a breach of promise of marriage. The material part of the contract was: "In case you (the woman) do not marry before July 1st, 1912, I (the man) will on that date pay to you if living, a farther sum of \$5,000." Date of contract was June 17, 1909. Cause was ruled on demurrer. No reason appeared in the petition for making the stipulation in regard to marriage. No fact was pleaded which justified such restraint on the marriage of the woman. No benefit to the man appeared. *Held*, the restraint was unreasonable and contract was invalid.

NOTE: Being *res integra* the court reviews authorities and indicates in a general way that the restraints on marriage which have received recognition include restraints against marrying (a) before 21 years of age without consent, (b) a person under a certain age, (c) in a certain degree of relationship, (d) into a certain family, (e) a second time, (f) a person belonging to a particular religious communion.

Appeal from Polk District Court.—HON. W. S. AYRES, Judge.

SATURDAY, MARCH 19, 1915.

ACTION upon a written contract signed by T. F. Flynn. After the action was commenced, Flynn died and his executors were substituted as defendants.

An amended petition was filed, stating grounds for attachment, and the Iowa Loan and Trust Company and Ida

May Flynn were made parties defendant. All the defendants demurred to the petitions and their demurrers were sustained. The appeal is from these rulings.—*Affirmed*.

Dowell, McLennan & Groesbeck, for appellant.

R. L. Parrish, for appellee.

DEEMER, C. J.—The petition alleges that on or about the 17th day of June, 1909, plaintiff and the decedent, Flynn, who had theretofore been betrothed, because of Flynn's breach of agreement to marry the plaintiff entered into a written stipulation, the terms of which are as follows:

"My Dear Miss McCoy:

I will pay you the sum of five thousand (\$5,000.00) dollars on or before June 18th, 1909. And upon receipt of same you will agree to relinquish all further or future claim on me of any kind whatever, except that there is a mutual understanding between us that in case you do not marry before July 1st, 1912, I will on that date pay to you, if living a further sum of five thousand (\$5,000.00) dollars.

Your acceptance and agreement to this proposition to make its terms binding on each of us from and after date of its acceptance and each will abide by same.

Yours very truly,

T. J. FLYNN.

Terms and conditions of above letter have been accepted by me this 17th day of June, 1909.

TELLA MCCOY.

It is averred that this was accepted in full and complete satisfaction and settlement of all demands and claims of the plaintiff against the said Flynn, occasioned by his breach of promise to marry the plaintiff; that the deceased paid the plaintiff the sum of \$5,000.00 on or about the 17th day of June, 1909; but neglected to pay the \$5,000.00, maturing

July 1, 1912. Plaintiff further averred that she did not marry before the date stated and that she is yet a single woman.

The grounds for attachment, as stated in the amendment to her petition, were that Flynn fraudulently conveyed to Ida May Flynn and to the Iowa Loan and Trust Company substantially all of his property, both real and personal, for the purpose of cheating and defrauding his creditors, and especially this plaintiff.

The demurrer to the original petition was bottomed upon the proposition that the contract upon which the suit is predicated is null and void and contrary to public policy, in that it amounted to a restraint upon marriage.

1. ATTACHMENT: The demurrer to the petition for an attachment challenged the plaintiff's right to have such a writ, because of the death of the original defendant and the appointment of executors for his estate.

property subject to: property under administration.

Little is said in argument regarding the correctness of the latter ruling, and it merits little or no attention.

At the time the petition for the attachment was filed, the property of the deceased Flynn was in the possession of his executors for the purpose of being administered under his will, and was not subject to attachment.

If plaintiff sometime recovers a judgment on her claim, and the executors fail and refuse to bring action to set aside the conveyances because in fraud of Flynn's creditors, plaintiff might have some remedy; but it would not be by attachment of the property of the deceased, after it had passed to his executors. No authority need be cited upon so plain a proposition. The other question is much more difficult of solution.

The payment of the second \$5,000.00 was not to be made unless the plaintiff did not marry before July 1, 1912. The proposition was accepted by the plaintiff, and, so far as it is possible to make an agreement, it became mutually binding upon the parties thereto. In order to obtain the \$5,000.00,

plaintiff was compelled to remain single for something more than three years, no matter how many favorable opportunities she might have for a desirable marriage.

It is hornbook law that contracts in restraint of marriage are illegal, and as a rule it makes no difference how long the restraint. Of course, there are many exceptions to this rule,

some of which will be noticed during the course of the opinion. In some cases it is held that if the restraint be reasonable, it is not inimical to public policy; but there is nothing in the record showing any reason for the making of the stipulation, and no facts are pleaded which would justify any such limitation upon the plaintiff's right in morals or in law to take upon herself the relations of a wife, notwithstanding the breach of promise on the part of Flynn. No benefit or advantage to him is shown, but for reasons known only to him, he made his promise conditional on the fact that his former fiancée should not marry during the three years. The immediate tendency of this promise was to discourage marriage, and, as a rule, that tendency stamps such contracts as illegal. See: *Bostick v. Blades*, 59 Md. 231 (43 Am. Rep. 548); *Knost v. Knost*, 129 S. W. (Mo.) 665; *Arthur v. Cole*, 40 Am. Rep. (Md.) 409; *Conrad v. Williams*, 6 Hill (N. Y.) 444; *Waters v. Tazewell*, 9 Md. 291; *Maddox v. Maddox*, 11 Grat. (Va.) 804; *Hartley v. Rice*, 10 East. (Eng.) 22; *Sterling v. Sinnickson*, 5 N. J. Law 756. In the latter case, the suit was upon a contract which read as follows: "I, Seneca Sinnickson, am hereby bound to Benjamin Sterling for the sum of One Thousand Dollars, provided he is not lawfully married in the course of six months from date hereof." In speaking of the legality of the contract, the court said: "It has been spoken of, by the plaintiff, as if this were an obligation to pay money upon a future contingency, which any man has a right to make, either with, or without, consideration; and as if the not marrying of the plaintiff were not the consideration of the obligation, but the contingent event only upon

which it became payable. But I think this is not a correct view of the case. Where the event upon which the obligation becomes payable is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a contingency; it is rather the condition meritorious, upon which the obligation is entered into, the moving consideration upon which the money is to be paid. It is not, therefore, to be considered as a mere contingency, but as a consideration, and it must be such consideration as the law regards; nor does it at all vary the case, that the restraint was for six months only. It was still a restraint, and the law has made no limitation as to the time. Neither can the plaintiff's performance on his part help him. It imposed no obligation upon the defendant; it was wholly useless to him; the contract itself was void from the beginning."

In the early case of *Lowe v. Peers* (1770) Wilmot 364 (4 Burr.-2225), Lord Mansfield declared:

Matrimony is "one of the first commands given by God to mankind after the creation, repeated again after the deluge, and ever since echoed by the voice of nature to all mankind." See also: *Hartley v. Rice*, 10 East. 22; *Baker v. White*, 2 Vern. 215; *Grace v. Webb*, 15 Sim. 384.

In *Hartley's* case, the restraint was for six years, and in *Sterling's* case, *supra*, for six months. In *Grace's* case, the court said: "It is most beneficial to a state to have a multitude of subjects; and, therefore, restraints on marriage are objectionable as being against public policy. A man may make a provision for his wife, and declare that it is considered that a husband has a sort of interest to preserve the viduity of his wife, for the sake of his children. But the grantor of the annuity in the present case could not have had any motive whatever for inserting the proviso in the deed, except that the larger annuity might operate as an inducement to Elizabeth Castle not to marry."

Many exceptions exist to rules above stated.

There is nothing contrary to public policy for a person having a parental interest in his offspring to restrict marriage along certain lines, as infancy, relationship, and good morals. And agreements not to marry a person under a certain age, or in a certain degree of relationship, or into a certain family, or not to marry a second time, have been held valid. *Hogan v. Curtin*, 88 N. Y. 162; *Siddons v. Cockrell*, 131 Ill. 653.

In *Hogan's* case, *supra*, it is said: "A condition prohibiting marriage before twenty-one without consent, is by the common law valid and lawful. It is otherwise of conditions in general restraint of marriage, they being regarded as contrary to public policy, and the common weal and good order of society. But the reasonable conditions designed to prevent hasty or imprudent marriages, and to subject a child, or other object of the testator's bounty, to the just restraint of parents or friends during infancy, or other reasonable period, are upheld by the common law, not only because they are proper in themselves, but because by upholding them the law protects the owner of property in disposing of it under such lawful limitations and conditions as he may prescribe. Story Eq. Jur., Sec. 280 *et seq.*, and cases cited. Now it is the general rule of law that a breach of a lawful condition annexed to a legacy, either divests it, or prevents an estate therein arising in the legatee, depending upon whether the condition is precedent or subsequent. In accordance with this general principle, it was held in *In re Dickson's Trust*, 1 Sim. (N. S.) 37, a condition subsequent, that the legatee should not become a nun, was valid, and that the legacy was forfeited by breach of the condition, although there was no gift over. But it has been settled law of England for a long period, that a condition subsequent annexed to a legacy, in qualified restraint of marriage, although the restraint was lawful and reasonable, nevertheless did not operate upon a breach to divest the title of a legatee, unless there

was an express gift over on breach of the condition, or a direction that the legacy should fall into the residue, and pass therewith, which is deemed equivalent to a gift over. The condition where there is no devise over, is said to be *in terrorem* merely, a convenient phrase adopted by judges to stand in place of a reason for refusing to give effect to a valid condition. . . .

“In *Lloyd v. Branton*, Sir William Grant, referring to the subject, says: ‘Whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, I apprehend that, without such a devise, a subsequent condition of forfeiture on marriage without consent has never been enforced.’ It is not necessary to state at length the reason of the apparent anomaly in the law upon the subject. This is fully explained in the judgment of Lord Thurlow in *Scott v. Tyler*, 2 Bro. Ch. 432, and of Lord Loughborough, in *Stackpole v. Beaumont*. Suffice it to say, that it grew out of the adoption, by the English ecclesiastical courts and the courts of equity, of the rules of the civil and canon law, by which all conditions in restraint of marriage (with very limited exceptions), or conditions requiring consent, were held to be void. The ecclesiastical courts, having jurisdiction to enforce the payment of legacies, adopted the rule of the civil law in all cases, without considering that by the common law, reasonable conditions in restraint of marriage were valid. The distinction made in cases where there was an express devise over, does not seem to be founded upon any principle, and may possibly have grown out of an effort to partially restore the harmony of the law.

“It is a clear proposition, therefore, that, according to the settled law of England, the legacy in this case, if it is regarded as a purely personal legacy, was not forfeited by the marriage of the testator’s daughter without consent. There was no devise over on breach of the condition. The only gift over was in the event of the daughter’s dying unmarried before twenty-one. It has been frequently decided that a

general gift of a residue is not a gift over within the rule. *Wheeler v. Bingham, supra; Lloyd v. Branton, supra.* The condition therefore in this case would be *in terrorem* only within the cases cited.

"But the legacy is not a purely personal legacy. The testator charges the lands devised as an auxiliary fund for the payment of debts and legacies, and there is no personalty out of which the legacy can be paid. If it is paid therefore it can be only by a sale of the land on which the legacy is charged. This presents a case where the condition must be construed and effect given to it according to the general rule of the common law. *Reynish v. Martin* was the case of a legacy upon a condition in restraint of marriage without consent, charged upon land in aid of the personalty. The legatee married without consent, and afterward suit was brought to compel a sale of the land to pay the legacy, and Lord Hardwicke denied this relief, saying that 'where a legacy is a charge upon the lands, to be raised out of the real estate, as the ecclesiastical courts have no jurisdiction, it must be governed by the rules of another forum, to which the jurisdiction properly belongs;' and in *Scott v. Tyler*, Lord Thurlow said, 'Lands devised, charged upon it powers to be exercised over it, money legacies referring to such charges, money to be laid out in land (though I do not find this yet resolved), follow the rule of the common law and are to be executed by analogy to it.' And Judge Story, speaking of the distinctions between conditions in restraint of marriage, annexed to a bequest of personal estate, and the like, conditions annexed to a devise of real estate, or to a charge upon it, says: 'In the latter cases (touching real estate) the doctrine of the common law as to conditions is strictly applied. If the condition be precedent it must be strictly complied with in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to divest an estate.' Story Eq. Jur., Sec. 288." See also *Cornell v. Lovett*, 11 Casey

100; *Com. v. Stauffer*, 10 Penn. St. 350 (51 Am. Dec. 489); *Wms. Pers. Prop.* (4th Ed.) 369, 370.

Quite analogous to these exceptions is another, relating to the disposition of property by gift or will, where it is generally held that the donor or testator may impose such conditions to his gift or devise as he may elect. Although even in this case there are some refined exceptions to the exception.

This is most clearly stated by Pomeroy in his work on *Equity Jurisprudence*, Vol. 2, Second Edition, Sec. 933:

“Intimately connected with contracts in restraint of marriage, and depending upon the same principle, are conditions and limitations operating in like manner annexed to or forming part of testamentary dispositions, or of family settlements, or similar gifts. Although the subject, in some of its special applications and phases, is still more confused and uncertain than perhaps any other branch of equity jurisprudence, yet certain general rules have been established beyond all further controversy. Two propositions lie at the foundation, and are recognized by all the authorities:

“1. It is ordinarily said that all conditions annexed to gifts which prohibit marriage generally and absolutely are void and inoperative. This, however, is a very inaccurate mode of statement, since a condition precedent annexed to a devise of land, even if in complete restraint, will, if broken, be operative and prevent the devise from taking effect. With this limitation all conditions in general restraint are void. Also if a condition is not in absolute restraint, but is of such form that it will probably operate as a general prohibition, it is, under the same limitation, void.

“2. On the other hand, conditions annexed to testamentary or other gifts, in partial and reasonable restraint of marriage, are valid and operative; such, for example, as that a devisee or legatee should not marry under age, or should not marry without the consent of parents, guardians, or trustees, or should not marry a particular person, or a person

belonging to a particular religious communion. In the application of these two propositions, certain special rules have been settled with more or less certainty, depending upon the facts of the condition being precedent or subsequent, of there being, or not, a gift over upon its breach, and of the original gift to which the condition is annexed being one of real or of personal estate. The system which has been developed is a partial compromise between the technical common-law rules concerning conditions, and the doctrines of the Roman law, which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features. If a condition is precedent and annexed to a gift of land, it operates as at the common law; when broken, it prevents the estate from vesting, whatever be its nature; when annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect, if partial and reasonable, it is operative. When a condition is subsequent and annexed to a gift of land, if general, it is void, and although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative. It seems to be settled by an overwhelming weight of authority that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women are valid, and by the most recent decisions the same rule has been applied to the second marriages of men. Where a partial and reasonable condition has been imposed, requiring the consent of certain persons to the marriage of a donee, courts of equity are very liberal in construing the provision so that the gift shall not be defeated by a mere formal omission."

The text is fortified by innumerable citations in support thereof and it may be taken as announcing the voice of authority. That contracts in restraint of a second marriage are valid, is everywhere affirmed. *Appleby v. Appleby*, 111 N. W. (Minn.) 305 (10 L. R. A. (N. S.) 590, 10 Ann. Cases, 563).

The reason for this exception is:

“The reason for the rule as to first marriage has no substantial force when applied to a second marriage. Neither the conservation of morals nor public policy furnish a basis for the rule as applied to the right of a husband or wife to withhold his or her estate from passing to the support of a second husband or second wife, as the case might be; and the authorities declare that the rule has never been extended to second marriages. The precise question arose in *Allen v. Jackson*, referred to above, and the court distinctly held that the rule did not apply to a second marriage. The question was fully considered in *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548, a case involving a devise by the wife of certain property to the husband, so long as he should remain unmarried after her death. The court held the will valid on the ground that the rule referred to did not extend to second marriages. The court also considered at some length whether the rule should be limited to the second marriage of the wife, or whether it included both husband and wife. Upon that subject, the court said: ‘In the absence of any binding authority to the contrary, we are of opinion that there is no good and substantial ground for maintaining a distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. As the one is valid and effectual, so is the other.’

“In *Knight v. Mahoney*, *supra*, the testator gave his property to his wife, ‘so long as she remains my widow.’ She married again after her husband’s death, and the controversy arose whether the provisions of the will were valid. The

court said that the weight of authority sustained devises and bequests conditioned to terminate upon second marriage, citing, in support of the decision, 2 Pom. Eq. Jur. 933; *White v. Sawyer*, 13 Metc. 546; *Loring v. Loring*, 100 Mass. 340; *Gibbens v. Gibbens*, 140 Mass. 102 (54 Am. Rep. 453, 3 N. E. 1), and some of the cases heretofore referred to.

"It is unnecessary to discuss the reasons for the rule. The welfare of children by the first marriage is an element entering into consideration in determining the validity of such limitations, as well as the right of persons freely to enter into the marriage relation as their station in life and inclinations may justify and prompt. But no sound principle, founded upon either moral or legal obligation, extends the right of either husband or wife to retain the property of the other, in the face of lawful restrictions to the contrary, for the purpose of supporting and maintaining another spouse. The fact that appellant had no children by this marriage does not, as a matter of law, relate back and render the restrictions or limitations of the antenuptial contract unreasonable."

Again, in all these cases, a distinction has been preserved between conditions precedent, limitations and conditions subsequent, the latter of which are disregarded. See cases cited in note to *In re Estate of Fitzgerald deceased v. Fitzgerald*, 49 L. R. A. (N. S.) 615.

We have never before had the questions here involved for decision and the authorities generally are not in entire harmony. We have endeavored to state the rules and exceptions generally recognized in this country and in England, and, in applying them to this case, we are constrained to hold that the contract in question is in restraint of marriage, and that it does not fall within any of the exceptions noted.

Of course, plaintiff's action for breach of promise of marriage still remains, unless barred by the statute of limitations; but she cannot have recovery upon the agreement, for that is contrary to public policy. This was the conclu-

sion of the trial court, and it follows that its judgment must be and it is *Affirmed*.

LADD, GAYNOR and SALINGER, JJ., concur.

H. M. SCHOFIELD et al., Appellants, v. INDEPENDENT SCHOOL DISTRICT OF FERGUSON, et al., Appellees.

SCHOOLS AND SCHOOL DISTRICTS: Statutory Consolidation—Election—Posting Notices—Construction of Statute. Judicial authority to construe a statute, though the statute be obscure and doubtful in its terms, does not embrace the authority to amend it. So held under Sec. 2746, Code, specifying the sufficiency of notices of school elections.

PRINCIPLE APPLIED: It was proposed, under Sec. 2794, Sup. Code, 1913, to consolidate the territory or parts of territory of several subdistricts—some nine tracts in all—into an independent school district. Sec. 2746, Code, provides that the notice of election to vote on the consolidation shall be posted “in at least five public places in said corporation.” Five notices were posted within the limits of the said nine tracts. *Held*, the notice given was sufficient—that to hold that the statute required the posting of five notices in each subdistrict or part thereof proposed to be included in the consolidation would, in effect, be a judicial amendment to the statute.

Appeal from Marshall District Court.—HON. C. B. BRADSHAW, Judge.

FRIDAY, MARCH 19, 1915.

SUIT in equity to test the validity of the organization of an independent school district and to restrain the persons claiming to hold office therein from exercising the functions or performing the duties pertaining to such positions. The material facts are stated in the opinion.—*Affirmed*.

Bradford & Johnson, for appellants.

C. H. Van Law, for appellees.

WEAVER, J.—Proceedings for the consolidation of the territory or parts of the territory of several sub-districts into an independent school district were instituted upon a petition alleged to be signed by more than one-third of the qualified voters residing within the boundaries of such territory, and at an election called pursuant to such petition, a majority of the votes cast was in favor of the proposed consolidation. Of the consolidated district, certain duly qualified persons were chosen to fill the offices contemplated by the statute for school corporations of that character. All of these persons, together with the consolidated district, are made defendants in this suit. In their petition, plaintiffs, who are resident electors of the territory in question, assailed the validity of the organization of the consolidated district on various grounds and prayed that the proceedings had in said matter and the election held therein be decreed to be void and of no effect and that the alleged officers of the consolidated district be permanently enjoined from exercising any of the functions or powers pertaining to such positions. A temporary injunction was asked and granted. On defendants' motion to dissolve the injunction, a full hearing was had of the facts in controversy and thereupon the court sustained the motion and dissolved the injunction. From this ruling the plaintiffs appeal.

In argument to this court, the appellants waive all other objections and place their sole reliance for a reversal upon the proposition that the notice upon which the election was

1. SCHOOL AND SCHOOL DISTRICTS: statutory consolidation: election: posting notice: construction of statute. called and held was not given as required by law and that such election was, therefore, without legal force or effect and the attempted organization of the consolidated district in pursuance thereof was fatally defective.

The substance of the objection to the election notice is as follows: The statute which authorizes such consolidation of territory from two or more sub-districts into an independent district provides that the election to be held for that purpose

shall be upon the same notice which is required for other school elections. Code Sec. 2794. The general provision to which such reference is made is assumed to be the one found in Code Sec. 2746, which directs the posting of the notice of district elections in five public places within the district. In the case before us, the proposed consolidation included territory to be taken from several sub-districts—eight or nine in number, according to appellants. Five notices were in fact posted for the prescribed time in five different public places within the limits of this territory, but it is the contention of the appellants that to meet the requirement of the statute, five such notices should have been posted in each sub-district from which such territory was to be taken and as this was admittedly not done, it invalidated the entire proceeding. In support of the appeal, much is said of the inadequacy of five posted notices to attract or receive the attention of the body of voters entitled to take part in the election and of the possible injustice which may result from such limited publicity of an important measure of general interest. While considerations of public convenience and wise public policy are not to be overlooked in the interpretation of an obscure or doubtful statutory provision, judicial authority to interpret and construe the language of an act of the legislature does not include authority to amend it, even though the suggested amendment may commend itself to court and counsel as being both wise and just. To hold with appellants upon the question here presented would be to amend rather than to construe the statute. If the question of consolidation were to be submitted to the electors of the several sub-districts voting separately, each in his own sub-district at polls opened for that purpose, then the appellants' construction of the provision for notice would naturally follow. But such is not the provision. The election is one to be held within and for the proposed consolidated district, and when the act directs that the notice shall be given as provided in other cases, it is reasonably susceptible of but one construction, and that is

that the same number of notices shall be posted within the proposed district and for the same length of time as required for the calling of other district elections. If any weight is to be given to the objection that such notice is too restricted to give the matter due publicity, it should be said, also, that an application of appellants' theory would often make the validity of such election turn upon a matter of idle form. For example, on that theory, if the proposed consolidation includes any part of a sub-district, even though it be but a single small tract of land on which there reside not more than one or two electors, five notices must be posted there in order to validate the election. As applied to the case at bar, if appellants are right in saying that eight or nine sub-districts contribute some part of their territory to this consolidation, forty or forty-five notices should have been posted. In the absence of a statute clearly requiring such overabundant notice, the court should be slow to annul an election upon such ground. As a matter of common observation, the people of the average school district are sensitive and alert upon all proposed changes and innovations and any proposed public movement in school or district affairs upon which there is likely to arise any marked division of sentiment needs very little formal legal notice to make it the topic of general if not universal discussion. In most cases, forty notices will be no more certain than five to attract attention or to bring to the polls those who desire to register their votes upon the proposition. Had the legislature thought it necessary or expedient to require the full number of five notices in each and every sub-district or part of sub-district within the proposed consolidated district, we must presume it would have so provided, and not have left such a vital regulation to depend upon a judicial construction.

We hold, therefore, that the trial court did not err in finding that the election was duly called and that the injunction ought to be vacated. Other issues have to some extent been argued by counsel for the appellees, but in so far as

they were decided by the trial court and are not argued or submitted by the appellants, the adjudication below would seem to be final and its correctness is not here open to question.

For the reasons stated, the ruling and judgment of the district court are *Affirmed*.

DEEMER, C. J., and LADD, GAYNOR and SALINGER, JJ.,
concur.

SALINGER, J., concurring.—

I agree to the result reached. But if the opinion can be said to rule, that posting five notices in five public places in the territory which proposes a consolidated school district, without the posting of five notices in the territory proposed to be annexed, is a compliance with the statute, I dissent from such ruling.

The only complaint made by appellant is by a statement under the head "Error relied on for reversal", that failure to post five notices "in each of the nine school, or parts of school corporations, sought to be consolidated", is a disregard of the law. I place my concurrence expressly upon the ground that this is the only error presented, and that the assignment is not well taken. In my view, the territory proposing the consolidation is, for the purposes of the question at bar, one entity, while the sum total of the various divisions composing the territory proposed to be annexed is the second entity. It follows that if five notices are posted in proper manner in the territory of the first entity and five others in that of the second entity, legal notice has been given, although five notices have not been posted in each of the various districts or parts of districts which, taken together, form the total territory proposed to be annexed.

IN RE ESTATE OF M. B. DOOLITTLE, Deceased.

EXECUTORS AND ADMINISTRATORS: Appointment—Confirming

1 **Request of Testator.** The nomination in a will of a certain person as executor will be confirmed by the court unless strong and persuasive reasons against so doing are made to appear.

PRINCIPLE APPLIED: The appointment of the one requested by the testator held to be proper, though she was testator's divorced wife, holding a claim against the estate, the testator having had opportunity to change his will and not having done so.

EXECUTORS AND ADMINISTRATORS: Appointment—Discretion

2 **of Court.** The discretion of the probate court, in appointing as executor the person requested by testator in his will, will not be questioned on appeal, unless the action of the court appears to have been arbitrary, unjust and without reason.

Appeal from Howard District Court.—HON. A. N. HOBSON,
Judge.

TUESDAY, DECEMBER 15, 1914.

REHEARING DENIED MONDAY, MARCH 22, 1915.

Appeal from an order appointing Anna E. Doolittle as an executrix, with J. E. Doolittle and John H. Jones as executors of the last will and testament of M. B. Doolittle, deceased.—*Affirmed.*

Reed & Pergler, for appellant.

Edwin A. Church, and *John McCook*, for appellees.

DEEMER, J.—M. B. Doolittle died testate July 15, 1913. By the terms of his will he devised to his wife, Anna E. Doolittle, eighty acres of land and certain personal property, and the remainder of his estate was specifically devised to various

heirs, with a provision that if anything be left it should go one-third to his wife, and the remainder to named heirs. He nominated his wife, Anna E. Doolittle, his son, J. E. Doolittle, and the then county auditor as executors of his will. He made three codicils to this will, one June 28, 1905, another May 27, 1910, and the third November 28, 1911. In these he made no change in the provision for his wife, but in the second codicil he changed his nomination of executors to J. H. Jones, F. C. Blandin and J. E. Doolittle. In the last codicil he again named Anna E. Doolittle, J. E. Doolittle, and J. H. Jones, county auditor, as his executors. The will, with its codicils, was filed for probate July 19, 1913, and on October 6th of the same year J. E. Doolittle filed objections to the confirmation and appointment of Anna E. Doolittle as an executrix.

In these objections he alleged that Anna Doolittle, the wife, brought action against the deceased for a divorce some time in February of the year 1912, based upon cruel and inhuman treatment; that she prosecuted the action to a decree on January 31, 1913; that by the decree the wife was given a divorce and awarded alimony which consisted of a house and lots in the city of Cresco, with \$15,000.00 additional; and the decree further provided that: "In case Anna E. Doolittle shall be compelled to pay any part of any judgment or judgments in litigation with one A. T. Jolly or with the administrator of Mrs. A. T. Jolly estate, that Anna E. Doolittle may recover such amount or amounts from decedent, and that decedent's property be held therefor as between Anna E. Doolittle and decedent."

It was further decreed that in case of an appeal from the decree by the decedent, said decedent should pay to the clerk of the court, for the benefit of Anna E. Doolittle, as temporary alimony, pending the appeal, seventy-five dollars each month.

Said decree, and each part thereof, was appealed from by decedent, on the 10th day of February, 1913, and the

appeal was perfected on that day. On the 21st day of March, 1913, Anna E. Doolittle appealed from that part of the decree giving and allowing her permanent alimony, and her appeal was perfected on the day last mentioned.

It is also stated in these objections that Anna E. Doolittle is a creditor of the estate, and that her interests were and are antagonistic thereto, and inconsistent therewith. It was also stated:

"That this objector believes that the decree aforesaid was erroneously granted and that thereby decedent's property was wrongfully diverted from its appropriate channel of devolution, and that to this end the personal representatives of decedent should prosecute the appellate proceedings commenced by decedent, in order that conflicting rights between the heirs, devisees and legatees of decedent and Anna E. Doolittle might be finally determined."

The objections further state:

"That John McCook, Esq., attorney and counsellor, was and is attorney of record for A. T. Jolly and the estate of Mrs. A. T. Jolly and prosecuted the above litigation in their behalf; and that said John McCook, Esq., is now attorney for Anna E. Doolittle in regard to matters growing out of the decedent's will.

"That this objector is a son of the decedent, a devisee and legatee under the will and nominated as one of the executors by said will.

"That at the May, 1913, term of this court there was rendered, in the case of A. T. Jolly v. M. B. and Mrs. M. B. Doolittle, a judgment for seven hundred and fifty dollars against M. B. Doolittle and Mrs. M. B. Doolittle; that on the 28th day of May, 1913, M. B. Doolittle appealed from said judgment to the Supreme Court of Iowa by serving a notice of appeal on John McCook and Frank Sayre, attorneys for A. T. Jolly, and service of said notice was accepted

by John McCook, Esq., and P. C. Blandin, clerk of the district court of Iowa in and for Howard County.

"That there is still pending in this court the case of S. A. Sutton, administrator of the estate of Mrs. A. T. Jolly v. M. B. Doolittle and Mrs. M. B. Doolittle, and the prayer of the petition in said case asks for a judgment of \$10,000.00 v. M. B. Doolittle and Mrs. M. B. Doolittle; and John McCook, Esq., is one of the attorneys for said administrator."

The case came on for hearing on these objections and it was stipulated that the facts recited in these objections, as distinguished from legal conclusions, were true, and the trial court also read into the record the following statement:

"The court upon its own motion states that it understands that the property of M. B. Doolittle, deceased, is largely real estate; that it has been stated during this hearing that the personal property belonging to the estate does probably not exceed five thousand dollars; that the indebtedness is probably not in excess of from two to three thousand dollars, barring possibly court costs in some of the cases, the Jolly case and the divorce case, spoken of in the stipulation just entered. In relation to the paragraph referring to temporary alimony, an allowance of \$75.00 a month, the court states that at the time the decree was entered that it understood Mrs. Doolittle to be entirely without means of support excepting as she received such means from M. B. Doolittle, that in case of an appeal and the execution of bonds the court was fearful that the means of subsistence of Mrs. Doolittle would be cut off and allowed her the \$75.00 per month contingent upon the appeal being taken so as to secure to her an independent means of support during said appeal.

"In relation to the order relating to the payment by M. B. Doolittle of another judgment which should be entered in the Jolly case, the court had in mind the fact that from the voluminous record constituting the record in the divorce case submitted to the court that the amount of the estate of

M. B. Doolittle was somewhat in doubt; that the court thought it possibly might exceed largely the amount found by the court; that in order to insure to Mrs. Doolittle the amount of alimony which it thought she should receive on the record as presented to the court, the court in order to guard against the diminution of the alimony by any contingency decreed as a part of said alimony that Mr. Doolittle pay the judgment in the Jolly case, and that it was not the intention of the court to grant any relief in any other manner than as a part of the application for alimony submitted to it.

"The court further states that the said M. B. Doolittle died on the 15th day of July, 1913, and that the court has, it believes, personal knowledge of the fact that up to the date of his death he was seemingly very much attached to Julius E. Doolittle, his son, and to Mr. John H. Jones, and that the facts of the litigation in the Doolittle estate were all known to Mr. Doolittle, and no change has occurred in his affairs except what were fully known to him at the time of his death and while he was apparently in the possession of his senses."

Upon this record the trial court made the following order and ruling:

"Nomination of J. E. Doolittle, Anna E. Doolittle and John H. Jones as executors approved and confirmed. Bond of executors fixed at \$10,000.00. In case executors elect to execute individual bonds the amount of such bond is fixed at \$10,000.00 each. It is ordered by the court that the executors proceed and act concurrently and that in the event they are unable to do so, that no action be taken until application for orders is made to the court or judge and directions and orders thereon entered. J. E. Doolittle duly excepted."

The appeal is from this ruling.

The main points made for the appellant are that the court was not bound by the nominations made in the will; that

one whose interests are adverse and hostile to the estate should not be appointed an executrix, even though named in the will; that one executor or administrator, where there are two or more, cannot sue another; and that, as a matter of policy, one who has a claim in litigation against one deceased should not be appointed administrator or executor of the latter's estate.

1. EXECUTORS
AND ADMINIS-
TRATORS : ap-
pointment :
confirming re-
quest of
testator.

It is true, of course, under our statutes and decisions that the court is not bound to recognize the nomination of an executor by will. The probate court has a discretion in such matters, and may or may not recognize an appointment by will. *In re Van Vleck's Estate*, 123 Iowa 89; *Burlington Assn. v. Gerlinger*, 111 Iowa 293.

But under our rule it was said in *Pickering v. Weiting*, 47 Iowa 242: "Where a person is named as executor in a will it is presumed that in the judgment of the testator he possessed a special fitness for the discharge of the trust, indeed the very reason that he is named at all must be because the testator desired that he should administer rather than any one else."

Again in *In re Miller*, 92 Iowa 741, this court said: "There is, or at least ought to be, no question that the executor appointed by the testator, in the absence of disqualification, should be commissioned by the court. . . . But all such considerations should be subordinate to the fact that the original will was executed in the year 1880, and that Dorris was then selected as executor, and, although two codicils were made, the last in 1892, there was not only no revocation of appointment of executor, but in the last codicil his appointment is recognized. . . . The appointment of an executor thus deliberately and solemnly chosen should not be ignored, disregarded and set aside unless for the most persuasive and controlling reasons." And in *In re Estate of Smalle*, 150 Iowa 391, the court said: "Such appointment must stand

unless it is made to appear that the appointment would not have been made by the testator with knowledge of the conditions existing at the time the court is asked to confirm such appointment." See also sustaining the same doctrine: *In re Fisher Estate*, 128 Iowa 628; *Fry v. Fry*, 155 Iowa 254.

The net result of a study and analysis of our cases is that the matter of recognizing the nomination lies within the sound discretion of the court, and that the nomination

2. EXECUTORS
AND ADMINIS-
TRATORS: ap-
pointment:
discretion of
court.

will be recognized in the absence of a rather strong showing against the appointment. Treating the matter as discretionary with the court, and accepting the statements of the judge as to his reasons for making the appointment, we see no reason for holding that there was such an abuse of discretion as to call for a reversal of the case. It is not enough that we would have made a different order, as we doubtless would have done, as an original proposition; for more is required to disturb a discretionary order than to convince us that, as an original proposition, we would have done otherwise. An abuse of discretion means more than an error in judgment. The error must be such as to convince us that it was arbitrary, unjust and without reason; and such does not appear to be the situation here.

No personal hostility between plaintiff and the other executors is shown, and while a claim is made that Mrs. Doolittle would not care to preserve the assets of the estate, the record shows that she has a residuary claim under the will and for that reason it would be to her interest to conserve and preserve the estate. Deceased knew for some months before his death of all the claims which his wife is now making. The decree of the lower court in the divorce case had been passed, and an appeal had been taken by him, yet he did not on that account make any change in his will so far as his former wife was concerned, but allowed and permitted it to remain as it was after the last codicil, hitherto mentioned, was made. This fact brings the case within the rule of *Miller's case*, *supra*.

It will be noticed that three executors were named by the will, and codicil, and that these three were appointed by the court. Two of them, being a majority, might act and should act after consulting with their associate or after giving her a chance to act. As we understand the rule a majority may act in such cases, and their conclusion is binding, although the third may not concur. Moreover, the court in its order fortified the entire matter by requiring the executors to act concurrently, and not by majority, and in the event of any disagreement, to submit the matters in dispute to him. This sufficiently safeguarded the matter in that he retained such control over the conduct of the executors as to thoroughly protect the estate.

For the reasons stated we do not feel justified in interfering with the order, and it is, therefore, *Affirmed*.

LADD, C. J., GAYNOR and WITHROW, JJ., concur.

FRANCIS EUGENE HESS, Appellee, v. KERNEN BROTHERS,
Appellants.

DEED: Construction—Grant of Fee—Rejection of Repugnant Clause

- 1 —**When Rule Inapplicable.** That the clear grant of a "fee title" demands the rejection of a subsequent repugnant clause is a rule not applicable when the granting clause itself contains a limitation on the fee.

PRINCIPLE APPLIED: A father, conveying his entire fee, provided:

1. That his son Francis take "an estate for life or for years," on certain conditions, a violation of which worked a forfeiture.
2. That if Francis did not breach the conditions, he should have a full life estate.
3. That if the estate of Francis was ended by breach of conditions or by death, and he was then married, his wife should take an estate as long as she remained his wife or widow, "but the fee simple title shall pass to and be vested in the issue of Francis if any there be who are living at the time of his death."
4. That "if Francis shall be without issue, at the termination

of his estate, the fee simple title shall vest in (four other named children of grantor) liable to be divested by the birth of children to Francis, after forfeiture and before his death."

5. Francis, who had no wife or issue, breached the conditions.

Held: The four other children did not, on the forfeiture of Francis, take a "fee simple title" as declared, but a "determinable fee"—a fee liable to be terminated by the existence of living children of Francis at the time of his death.

Appeal from Taylor District Court.—HON. H. K. EVANS,
Judge.

WEDNESDAY, DECEMBER 16, 1914.

REHEARING DENIED MONDAY, MARCH 22, 1915.

ACTION to quiet title. Opinion states the facts. *Reversed* and *Remanded*.

G. B. Haddock, for appellee.

Crum, Jaqua & Crum, for appellants.

GAYNOR, J.—On the 26th day of August, 1913, the plaintiff filed his petition asking that the title to certain land be quieted in him for the use and benefit of the defendants, Kernens Bros., and that the defendants and each of them, except Kernens Bros., or those claiming by, through, or under them, be forever barred and estopped from claiming any interest in the real estate.

Kernens Bros. alone appeared and filed answer in which they say that on the 30th day of June, 1913, they entered into a contract with the plaintiff for the purchase of the real estate in controversy; that the plaintiff agreed to convey said real estate to them by warranty deed, and agreed to furnish them an abstract of title showing perfect title in the plaintiff as of that date. Admitted that if the court granted the plaintiff the relief demanded in its petition against all the defendants, except these answering defendants, Kernens Bros., the

title will then be good and perfect in the plaintiff except for the things hereinafter set out.

The defendants say that on the 30th day of June, 1904, one C. C. Hess, who was the father of the plaintiff, owned said land absolutely; that on said date he executed and delivered to the plaintiff an instrument of conveyance as follows:

“Par. 1. That I, C. C. Hess, unmarried, of Taylor County and State of Iowa, in consideration of love and affection, do hereby convey to the persons hereinafter named, and upon the terms and conditions hereinafter named, the following described real estate, situated in Taylor County, Iowa. (Here follows a description of the land in controversy with other land.)

“Par. 2. I convey to my son, Francis E. Hess, an estate for life or for years in the above described real estate subject to the express conditions that he shall not sell or encumber his estate by his voluntary act nor shall he do any act by which his estate may be divested by any legal process; and upon the happening of any event, as an attempt on his part to sell or encumber his estate, or the seizure of his estate under execution or attachment or other legal process, or the advertisement for sale of the above land for the nonpayment of taxes or assessments, then the rights, interest, and estate of Francis E. Hess shall be forfeited, and be at an end, and the above real estate shall then pass to the persons hereinafter named, with title as hereinafter set forth.

“Par. 3. If my said son, Francis E. Hess, shall not do any act or suffer anything to be done that will work a forfeiture of his estate, as above provided, he is to have the full use and enjoyment of said land during the term of his natural life, and upon his death, the above real estate shall pass to the persons hereinafter named, with title as hereinafter stated.

“Par. 4. If, at the time of the termination of the estate of Francis E. Hess, either by death or forfeiture, he is then married, his wife or widow shall have an estate in said land

as long as she remains his wife or widow, but the fee simple title shall pass to and be vested in the issue of Francis E. Hess, if any there be, who are living at the time of his death, meaning and intending that the descendants of any child that may be dead shall take the share that would have fallen to the parent if living.

"Par. 5. If Francis E. Hess shall be without issue at the termination of his estate, the fee simple title to the above real estate shall vest in my four children, Arthur L. Hess, Ethel Graff, Hope Hess and Florence Hess, in equal shares, or to the survivor or survivors of them, unless any of the four persons last above named shall have died prior to the termination of the estate, leaving issue, in which case, the share that would have gone to the deceased shall vest in the issue of such deceased, the estate thus granted to the four persons above named being liable to be divested by the birth of children to Francis E. Hess after forfeiture and before his death."

On the 20th day of March, 1913, the plaintiff made and delivered to Arthur L. Hess, Ethel Graff, Hope Hess Thorsen and Florence Hess, the following instrument of conveyance:

"Know all men by these presents:

"That I, Francis E. Hess, single, for a valuable consideration, do hereby surrender, renounce, release and convey to Arthur L. Hess, Ethel Graff, Hope Hess Thorsen, and Florence Hess, in equal shares, all the rights, title or interest that I have acquired through a certain deed made by C. C. Hess, dated June 30, 1904, and recorded in Taylor County, Iowa, on July 2d, 1904, in book 13 on page 597 and 598, of deed records to the following described lands, to wit:

"The south half of the northwest quarter of section thirty-one, township number sixty-nine, north, range number thirty-three, west of the 5th P. M. (and other land).

"The intention of this instrument is to divest myself of all title to the above described real estate, whether derived through said deed or otherwise, and to invest the above named persons therewith.

“The person above named as Hope Hess Thorsen is the same person described in the deed above referred to as Hope Hess.”

On the 21st day of March, 1913, the persons named as grantees in the last instrument conveyed the land in controversy, to wit, the south half of the northwest quarter of Sec. 31, township 69 north, range 33 west of the 5th P. M., and the other land described in the deed from C. C. Hess to Francis E. Hess, to one W. E. Crum, Taylor County, this state, by special warranty deed.

On the 12th day of April, 1913, W. E. Crum and wife conveyed the land in controversy by special warranty deed to the plaintiff, Francis E. Hess.

All these deeds were properly acknowledged and recorded.

During all the time since the making of the first deed to him, Francis E. Hess has been an unmarried man and without issue. Arthur L. Hess is now a married man and has one child. Ethel Graff is a married woman and has one child. Hope Hess is a married woman, her name being now Hope Hess Thorsen, and is without issue. Florence Hess is unmarried.

The defendants aver in their answer that because of the condition of the instrument made by C. C. Hess, conveying the land in question to Francis E. Hess, the plaintiff has not a good title, and cannot convey said real estate to the defendants by good and perfect title. Wherefore, they ask that they be allowed to rescind the contract and that the court declare the title not good and perfect such as defendants are entitled to under the contract.

To this answer, the plaintiff demurred, and the demurrer was sustained. Thereupon, defendants electing not to plead further, the court entered the following decree:

“It is therefore ordered, adjudged and decreed that title be and the same is hereby quieted in the plaintiff in and to the south half of the northwest quarter of Sec. thirty-one,

township sixty-nine north, range thirty-three west in Taylor County, Iowa, subject to plaintiff's contract to convey to defendants, Kernén Brothers, and the defendants, and each of them, and all persons claiming by, through or under them, or either of them, except Kernén Brothers, be and they are hereby estopped from ever having or claiming any title or interest in and to said premises. Subject only to the contract made with Kernén Brothers to convey, which conveyance when made by said Francis E. Hess to said Kernén Brothers, the court declares, will and does pass a good and perfect title to said Kernén Brothers.

"The defendants, Kernén Brothers, except."

From the ruling on the demurrer and the decree so entered, the defendants have appealed to this court, claiming that the court erred in sustaining the demurrer and in finding and holding that a good and perfect title to the land in controversy was in Francis E. Hess, subject only to the contract made with these defendants, and in holding that a conveyance, when made by Francis E. Hess to these defendants, would pass a good and perfect title to them.

A proper understanding of the disposition which we make of this case requires a careful analysis and a clear understanding of the several provisions of the deed from C. C. Hess to the plaintiff, under which, and by virtue of which, the title to this property rests in him. For convenience in reference we will divide the deed into five parts, numbering them paragraphs 1, 2, 3, 4 and 5.

By the first paragraph of the deed the then owner, C. C. Hess, undertook to and did divest himself of all title in the land and conveyed the same to persons thereafter named in the instrument, leaving no reversionary interest in himself.

1. DEED: construction: grant of fee: rejection of repugnant clause: when rule inapplicable.

By the second clause of the deed he conveyed to Francis E. Hess a life estate or estate for years. This life estate or estate for years so created is upon express conditions, upon a violation

of which the rights and interests of Francis become forfeited, and at an end, and the real estate thereupon passes to others named in the deed, leaving nothing in Francis of title or right to the land under this clause of the deed.

The third clause, however, provides that in the event Francis does not forfeit, he is to have the full use and benefit of the land during his natural life, and upon his death the estate passes to persons thereafter named.

The fourth clause provides that if, by any act of Francis done in violation of the prohibitions of the second clause, he forfeits his life estate or his estate for years, and he is then married, his wife shall have an estate in the land, as long as she remains his wife or widow, but if his estate is forfeited by death, and he is then married, his widow shall succeed to and have an estate in the land as long as she remains his widow. But, in either event, if his estate be terminated by death, or forfeited, and he is then married, his wife or widow, as the case may be, shall have an estate as long as she remains his wife or widow, but the fee simple shall pass to and be vested in the issue of Francis, if any there be, who are living at the time of his death.

By this fourth paragraph, it would appear that the grantor intended that if Francis forfeited his interest in the land by doing any of the acts prohibited, and was then married, an estate vested in his wife, and rested in her as long as she remained his wife or widow, and no longer; that if his title terminated by death, then if married his widow became invested with an estate in the land as long as she remained his widow. This would indicate an intention on the part of the grantor to make provision for the wife or widow of Francis upon the termination of the estate granted him, and clearly, under this provision, if Francis were married at the time of forfeiture, his wife would become vested with an estate in the land which would continue during the time she remained his wife or widow, and the fee would become vested in his issue, if any then living, and the passing of the estate would

be complete. But Francis, at the time of the termination of the estate, was not married and had no issue, and the fifth clause of the deed provides that if he be without issue at the termination of the estate the fee simple title would pass to the four children named in that clause of the deed.

If nothing further appeared it would seem that upon forfeiture of his right in the land by Francis, at a time when he was unmarried and had no issue, the title would pass to the four persons named in the fifth clause. The fifth clause provides, however, that if Francis shall be without issue at the termination of his estate, either by death or forfeiture, the fee simple title to the land shall vest in the four children named in that clause, subject, however, to be divested by the birth of children to Francis *after forfeiture*. The estate may terminate in two ways by the terms of the deed, either by the death of Francis, or by forfeiture. This last provision of the fifth clause is the troublesome one. We would not have much difficulty in disposing of the case if it were not for this clause.

It is fundamental in the consideration of deeds that the deed must be considered as an entity, and the whole deed and all it contains considered in determining its meaning and legal effect. See *Beedy v. Finney*, 118 Iowa 276, and cases therein cited.

It therefore becomes important in this case to ascertain from the reading of the whole instrument what the testator intended by the words, "The estate thus granted to the four persons above named being liable to be divested by the birth of children to Francis after forfeiture." The importance of these words is emphasized, and the attention of the mind drawn to a consideration of the whole deed because of these words, and the express provision found in the fifth clause, to wit, "that if Francis E. Hess shall be without issue at the termination of his estate, either by death or by forfeiture, the fee simple title to the real estate shall vest in these four children above named, share and share alike and to their heirs." It becomes important to determine under what con-

tingency or upon the happening of what event provided for or against in the deed, the "liability" rests, upon which these four persons are to be divested of the fee simple title to the land, and in whom it vests in case these four are divested. The answer to this must be found, if at all, in the fourth clause of the deed. It is the only clause of the deed in which any provision is made for the vesting of title in the children of Francis E. upon forfeiture. The fourth and fifth clauses must, necessarily, be considered together in arriving at the true meaning and intent of the grantor. Considered together they provide that upon the termination of the estate of Francis by forfeiture, the fee simple title shall pass to and be vested in the issue of Francis, who are living at the *time of his death*, if any there be. If there are none *in esse*, at the time of forfeiture, the fee simple title shall pass to the four named in the fifth clause, subject to be divested by the birth of children to Francis after forfeiture. The fourth and fifth clauses, taken together, would seem to indicate that upon the termination of the estate of Francis, the fee simple title would pass to and vest in the issue of Francis, whether born before or after forfeiture, if living at the time of his death. In no other way can we harmonize the provision in the fourth clause with the provision divesting title found in the fifth clause. The fourth clause gives the fee simple title to the issue of Francis, if any there be, who are living at the time of his death, and the provision in the fifth clause would indicate the intention of the testator to vest the title in the issue of Francis who are living at the time of his death, whether born before or after forfeiture, and that the title conveyed to the four named in the fifth clause, was subject to the contingency of a birth of a child to Francis at any time before his death, either before or after forfeiture.

The testator knew at the time this deed was made that Francis was an unmarried man, and therefore had no legitimate issue. He recognized the possibility that Francis would forfeit the estate, because it is a contingency against which

he made provision. He knew that possibly Francis would marry, either before or after forfeiture, and that issue might come of that marriage. The deed seems to make provision in contemplation of marriage, and of issue, born either before or after forfeiture. Such a contingency seems to have been in the mind of the grantor, and there seems to have been an evident purpose in his mind to make provision for such contingency. The grant made in the deed to the parties named in the fifth clause seems to have been made in contemplation of and upon condition that there be a definite failure of issue at the time of the death of Francis.

The idea of the testator seems to have been to create two estates in fee, neither depending on the other for its existence; the vesting of one depending upon the happening of a future event; the other vesting immediately, but its duration depending upon the happening of the same event. The four named in the fifth clause took a base, qualified, or terminable fee,—terminable upon the birth of issue to Francis after forfeiture, an event that might or might not happen. The possibility of its happening, however, seems to have been in the contemplation of the grantor. If children were never born to Francis, the fee in these four became absolute, but not until the death of Francis without issue.

The use of these words—base, qualified, and terminable, as signifying practically the same thing, in view of the early distinctions made in the use of the words, and the technical significance given to them,—may be the occasion of some criticism, but we think the general tendency is to consider them as practically interchangeable, and we use them in the sense in which the words themselves are understood, independent of technical meaning.

If the grantor had made the vesting of title in the issue of Francis dependent wholly upon the existence of the estate granted to Francis, the destruction of that estate before the birth of children might destroy the contingent estate of such unborn children, and we think the case of *Archer v. Jacobs*, 125 Iowa 467, so holds.

We are not unmindful of the rule that, when a deed is executed, and the granting clause conveys a fee title to a person named, any provision in the deed thereafter repugnant to the grant has been held to be void, and we think *McCleary v. Ellis*, 54 Iowa 311, *Case v. Dwire*, 60 Iowa 442, *McCormick Harvesting Co. v. Gates*, 75 Iowa 343, *Teaney v. Mains*, 113 Iowa 53, *Beedy v. Finney*, 118 Iowa 276, and *Prindle v. Orphans' Home*, 153 Iowa 234, support this contention of appellee.

But this rule does not apply where, in the very granting clause itself, the limitation upon the rights of the grantees is expressly made, or, in other words, if the conditional element is incorporated in the description of, or into the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder still remains vested. It is said in *Birdsall v. Birdsall*, 157 Iowa 363, 368,—and we think what is there said is apropos to the matter under discussion here: "It is to be noticed that by the language of the will in question the condition on which the children or their issue are to participate in the remainder is clearly precedent, and not a condition subsequent. The provision is not that the children are to take the remainder with the condition that in the event any one of them shall die his interest shall be forfeited, unless he shall have issue, in which event the issue shall take such interest, but on the other hand, the condition is expressed directly as a description of the persons in whom the remainder shall vest, and it is to vest in no particular person until such description becomes applicable by the termination of the life estate."

A conditional fee is somewhat different from an estate upon condition, and a conditional limitation is sometimes said to be a qualification upon the fee, and is distinguished from an estate upon condition. In case of a conditional limitation, the estate terminates upon the happening of the event expressed. In case of an estate upon condition, the estate is liable to be defeated, but is not in fact defeated until the

person who has a right to avail himself of the condition is in a position to do so, or, as some books say, has a right to avail himself of the condition, and enters and terminates the estate.

We think that the estate granted to the four named in the fifth clause, though designated as a fee simple title, was, by the terms of the grant itself, determinable upon the birth of children to Francis, a contingency that may or may not happen. When it does happen, the rights of these four under the grant are divested. We think that the deed itself contemplates the vesting of a contingent remainder in the issue of Francis living at the time of his death, and the plaintiff has not, therefore, acquired all the interest created by the deed. Children may be born to Francis who survive him, and their interests have not by any of the conveyances vested in Francis.

We think the case of *Birdsall v. Birdsall*, 157 Iowa 363, though not directly in point upon all the questions here submitted, is authority for the conclusion we have reached. See also *Friedman v. Steiner*, 107 Ill. 125; *Chapin v. Nott*, 203 Ill. 341; *Archer v. Jacobs*, 125 Iowa 467; *Shafer v. Tereso*, 133 Iowa 342.

We think therefore, in conclusion, that the deed conveyed a contingent fee to the issue of Francis, and this, whether *in esse* or not at the time his rights terminated, if afterwards born and living at the time of his death; that it gave to the four named in the fifth clause a determinable fee, the duration of which depends upon whether or not there are children born to Francis, living at the time of his death; that immediately upon the death of Francis with living issue, the rights of the four named in the fifth clause of the deed are terminated. The court therefore erred in holding that the several conveyances, hereinbefore set out, gave to the plaintiff a perfect title in the land in controversy. He had only the rights that the parties named in the fifth clause had at the time of their conveyance, and that was a determinable fee.

For the reasons above stated, the cause must be reversed and remanded.—*Reversed and Remanded.*

LADD, C. J., DEEMER and WITHROW, JJ., concur.

A. T. JOLLY, Appellee, v. J. E. DOOLITTLE et al.

TRIAL: Verdicts—Special Findings—Which Must Yield. A special
1 finding which negatives the existence of the ultimate question upon which plaintiff seeks recovery overthrows the verdict for plaintiff. (Sec. 3778, Code; Sec. 3728, Code.)

PRINCIPLE APPLIED: Plaintiff secured a verdict against defendant for assault on plaintiff's wife, resulting in her death. The special finding was that the wife did not die as a result, directly or indirectly, of the assault. *Held*, verdict must be set aside.

CONSPIRACY: Evidence of—Insufficiency. Evidence reviewed and
2 held insufficient to show conspiracy.

MASTER AND SERVANT: Torts of Servant—Course of Employment—Liability of Master. A principal is not liable for the
3 torts which his agent commits when not acting in the course of the employment.

PRINCIPLE APPLIED: A parent sent her sons to a place where she had a right to send them, to get material which she had a right to get. The sons committed an assault on a party. *Held*, the parent was not liable.

CONSPIRACY: How Proven—Circumstances—Approval of Act.
4 Circumstantial evidence may be sufficient to establish a conspiracy. Approval of an act likewise has bearing thereon. Evidence reviewed and held sufficient to require the question of conspiracy to be submitted to the jury.

TRIAL: Verdicts—Excessiveness—Exemplary Damages—New Trial.
5 The court cannot substitute its judgment in place of the judgment of the jury as to the amount of exemplary damages to be allowed.

PRINCIPLE APPLIED: Plaintiff recovered a judgment for \$1,500 which evidently was largely composed of exemplary damages. The trial court reduced it by half. *Held*, the court should have set the verdict aside and granted a new trial.

NEW TRIAL: Misconduct of Jurors—Prejudice Presumed. Misconduct of jurors considered and *held* to be such as to justify the presumption of prejudice and to demand a new trial.

PRINCIPAL AND AGENT: Existence of Relation—How Proven—
7 Declaration of Agent. Agency cannot be established by the declarations of the alleged agent.

ASSAULT AND BATTERY: Damages—Fright of Plaintiff's Chil-
8 dren. The effect which the fright of children had on their mother, she not being a party to the suit, is inadmissible.

Appeal from Howard District Court.—HON. W. J. SPRINGER,
Judge.

TUESDAY, DECEMBER 15, 1914.

REHEARING DENIED MONDAY, MARCH 22, 1915.

ACTION at law to recover damages for assaults committed upon plaintiff and his wife. Defense, general denials and pleas of self-defense. Trial to a jury; verdict for plaintiff against both defendants in the sum of \$1,500.00, which was reduced by the court to \$750.00; and judgment for the latter amount. Defendants appeal.—*Reversed and Remanded*

Reed & Pergler, for Jones and Doolittle, Executors

E. A. Church, for Mrs. M. B. Doolittle, appellants

John McCook and *Frank Sayre*, for appellee.

DEEMER, J.—The petition is in two counts. The first is for an alleged assault committed by Mrs. Doolittle upon plaintiff's wife, which resulted in the death of the latter; and the second is for alleged assaults committed by Amos and Mark Doolittle, minor sons of the defendants, upon the plaintiff himself. It is also alleged that said assaults were part of one general scheme; that they were instigated by both defendants, and that defendants conspired and confederated together, and with their sons, to commit the said assaults; and that the same were a part of one general scheme to force plaintiff and his

wife to leave the premises upon which they were then living, belonging to M. B. Doolittle; and that the said conspiracy was criminal and unlawful, and for unjustifiable ends.

Defendants interposed separate defenses, and each denied the allegations of the petition, pleaded that what was done was in self-defense, and also specifically denied the charge of conspiracy, etc., and further pleaded that the death of plaintiff's wife was due to other causes than the alleged assaults. Defendant M. B. Doolittle pleaded in mitigation of damages that whatever injury was inflicted upon either plaintiff or his wife was due to extreme provocation, and such conduct on the part of plaintiff and his wife as to bring about the alleged assaults. Evidence was adduced upon the issues tendered, and the case was submitted to the jury, not only for a general verdict, but also upon special interrogatories for answers thereto. The verdict was for plaintiff against both defendants, and the jury found in answer to the interrogatories that there was a conspiracy between defendant, M. B. Doolittle, and his sons to commit the assault upon the plaintiff, and also the result of a conspiracy between the said sons and both defendants; and that the assault upon plaintiff's wife was the result of a conspiracy on the part of both defendants. But it also found that Mrs. Jolly, plaintiff's wife, did not die as a result of the assaults or either of them, and that the acts done by Mrs. Doolittle did not contribute to the death of plaintiff's wife.

The defendants each moved for judgment in their favor upon the first count of the petition, based upon the said special findings, and each filed a motion for a new trial and to set aside the general verdict and the special findings, adverse to them, on many grounds, especially upon the ground of misconduct of one or more jurors in the jury room. The plaintiff made two offers to remit, the first one to remit \$500.00 from the verdict, and the second to remit \$750.00. The trial court reduced the verdict to \$750.00 and overruled the motions for a new trial, also the motion for judgment on the first count of the petition. Both defendants appeal.

We may say at the outset that, in view of the answers to the special interrogatories, the defendants' motions for judgment on the first count of the petition, which claimed damages

for the premature death of plaintiff's wife and nothing more, should have been sustained.

1. TRIAL: verdicts: special findings: which must yield.

The jury specially found that neither of the alleged assaults caused or contributed to the death of plaintiff's wife, and that of necessity was the end of the case, so far as the first count is concerned. Code Sec. 3778; *Seevers v. Cleveland Coal Co.*, 158 Iowa 574.

II. It follows that whatever errors may have been committed by the trial court in its rulings on matters affecting the first count are without prejudice and should be disregarded because of plaintiff's failure to recover on this count. Plaintiff has not appealed, and errors against him cannot be reviewed on this appeal.

As to the second count, which charges injury to the plaintiff's person by reason of an assault made upon him by defendant's sons, Amos and Mark Doolittle, it is to be observed

that neither of defendants was present at the time of this assault, and they are to be held liable, if at all, because they conspired with

2. CONSPIRACY: evidence of: insufficiency.

their sons to commit it or to do some unlawful act, or that they inspired the boys to commit the assault, aided or abetted them in so doing, or encouraged or incited them to do it. It is not necessary, of course, to show that both defendants conspired to commit the assault, for if either did, he may be held responsible under our rule, although the other did not join therein; but it is manifest that without proof of a conspiracy, or what is the equivalent, neither should be held liable. The trial court so instructed, and the special findings indicate that the jury found a conspiracy on the part of both defendants. Each defendant challenges the sufficiency of the testimony to justify such a finding, and we may say at the outset that we find no sufficient testimony to justify a verdict against Mrs. Doolittle on the theory that she conspired with her codefendant or with her sons, to commit the assault made by them

upon the plaintiff; and so far as she is concerned, the case should not have been submitted to the jury on this issue. It is useless to set out the testimony, for it is negative in character, and there is no positive testimony tending to connect this defendant with the assault upon plaintiff.

Indeed, the only thing relied upon is testimony that this defendant, or she and her husband, sent the boys to the premises where plaintiff lived, just before the altercation, to get some stone for use in laying a foundation for a barn, which a mason was then engaged in building for the defendant, M. B. Doolittle. The premises on which plaintiff resided belonged to M. B. Doolittle, and the stone was to be used for the foundation of a barn. The defendants had the right to get the stone from the place plaintiff was occupying, or at least there is no showing to the contrary. The boys came home after the assault, and this defendant helped bind up their wounds, at the same time expressing her indignation at plaintiff's conduct. This assault was on Thursday night, and plaintiff contends that on the following Monday night this defendant went to plaintiff's premises (which, under the record, she had a right to do), and there brandished a large butcher knife in the presence of plaintiff's wife, and either assaulted or threatened to assault the wife; but there is no testimony tending to connect the two assaults in any way, or that any person was concerned in this latter assault other than Mrs. Doolittle herself. This assault, as we have already seen, did no damage to plaintiff's wife.

There is some testimony that, at another time, Mrs. Doolittle was sent by her husband to get a contract from plaintiff, and that he (plaintiff) refused to deliver it to her. This is all the testimony against the defendant, Mrs.

3. MASTER AND
SERVANT: torts
of servant:
course of em-
ployment:
liability of
master.

Doolittle, connecting her in any way with the assault upon the plaintiff. Aside from the fact that Mrs. Doolittle acted in the presence of or by direction of her husband, in the premises, and under the law is presumed to have been under his

coercion, and assuming, *arguendo*, that she is responsible for all that she did, we do not find enough testimony to justify a verdict against her based on the theory that she was in any way connected with the assault made by her sons upon the plaintiff. Conceding, again, that the boys went to plaintiff's place to get the rock at defendant's directions, it does not appear that this was wrong or that the boys were not entitled to get the rock, and hence if upon that mission they turned aside and committed an assault upon plaintiff, which was due either in fact or through a ruse to the claim that plaintiff had not watered the hogs on the premises he was then occupying, as he had agreed to do, defendant would not be responsible on the theory that they were her agents and that she was bound by everything they did while on their mission of procuring the rock. The doctrine of *respondeat superior* does not go to that extent, and what they did was clearly outside of the scope of their employment. *De Camp v. R. R. Co.*, 12 Iowa 348; *Cooke v. R. R.*, 30 Iowa 202; *Kumba v. Gilham*, 79 N. W. (Wis.) 325; *Ferguson v. Terry*, Note in 10 L. R. A. (N. S.) 936 (Ky.); *La France v. Krayner*, 42 Iowa 143, 146; *Moore v. Fryman*, 154 Iowa 534.

The relationship existing between the parties, as mother and son, is no evidence of a conspiracy. *Hickox v. Bacon*, 97 N. W. (S. D.) 847.

III. As to M. B. Doolittle, who was alive at the time of trial and gave testimony in the case, we think there was enough to take the issue of his responsibility for the assault to a jury.

4. CONSPIRACY : The premises on which plaintiff was living
how proven : belonged to this defendant (and hereafter in
circumstances : speaking of him, we shall call him the defend-
approval of ant); and he, plaintiff, had two written con-
act. tracts with reference to the use of the premises with the
defendant, one covering the period from September 1, 1910,
to March 1, 1911, and the other from March 1, 1911, to March
1, 1912. Their difficulties arose on November 3, 1910, during
plaintiff's occupancy under the first contract, and with refer-

ence to the terms of the second. As to this second contract, plaintiff made complaint and wished the defendant to change or "fix it up" to suit him, plaintiff. This, defendant refused to do, and plaintiff then said he would leave the place within thirty days. He fixed this date because of the near confinement of his wife, and thought that it would be safe to remove her at that time. Defendant knew of the wife's condition, but upon this declaration being made, defendant said in an angry manner, "I don't know so much about your staying thirty days if you decide to go. I will manage to get you off and won't go to law about it either."

This conversation was had the last week in October, 1910, and on the third of November, the boys, Amos and Mark, went to the premises ostensibly, at least, to get the rock for the barn, and a dispute then arose between plaintiff and the boys as to plaintiff's violation of his agreement with defendant, and over a claimed telephonic communication of Mrs. Doolittle, either with plaintiff or plaintiff's wife. The immediate cause was a remark by one of the boys that the claimed communication was a damned lie; "that his mother had not telephoned any such message." Another of the boys said plaintiff had not lived up to his contract, and plaintiff remarked that was no concern of his (the boy's). Whereupon the boy remarked, "By God I am here to do my father's bidding, and I will do it or know why." The plaintiff then ordered the boys out of the house. The record then discloses the following:

"I said, 'Mark, you must get out, if you don't get out by asking you like a man, I will call the sheriff.' I rose up in my chair to go to the phone in the next room, and he struck me in the side of the face near the ear there and that prevented me from going to the phone. He struck me with his right hand, I suppose his fist was doubled, the blow seemed pretty hard; it did not knock me down because he struck me a glancing lick. He wounded me in the side of the jaw and

face, on the ear. My ear was considerable sore where he struck me, on the right ear and below there on the side of the ear where he knocked the skin off. I don't know how long it was sore, it was sore inside my head, I suppose a week or ten days, something like that. He knocked the blood out of me, I don't know how much I bled. It got on my clothing."

A general melee then followed, engaged in by the boys and by all the members of plaintiff's family, and the boys were driven from the house.

The injury to plaintiff in no way incapacitated him from work. Within a few days, and before the next Sunday, one of plaintiff's sons met defendant in the town where he lived, and defendant asked him if he had moved yet, to which the son said "No." The defendant then said, "Well, didn't the boys give you enough the other night? If they didn't they will give you enough." The boys, during the time of plaintiff's occupancy of the farm, were engaged with or for their father in the conduct of the place, and plaintiff had no right under the first contract but to occupy a part of the farm house. In consideration he was to help milk and do the chores. Defendant was to furnish one hand to do work upon the premises. Defendant's boys, or one of them, undertook to do this work, and assumed to see that plaintiff complied with his agreements. Under this record we think the question of defendant's responsibility for the assault was a question for the jury. A conspiracy may be proved by circumstantial as well as direct testimony (*Hanson v. Kline*, 136 Iowa 101; *Work v. McCoy*, 87 Iowa 217; *Price v. Price*, 91 Iowa 693) and the ultimate fact is generally for a jury. *Work v. McCoy, supra*; *Hines v. Whitehead*, 124 Iowa 262. Whilst mere approval of an act does not amount to proof of a conspiracy, such approval is testimony of more or less strength tending to show previous authority. *Brown v. Webster City*, 115 Iowa 511.

IV. The verdict must have included large exemplary damages, for the actual damages, as shown by the testimony, were

trifling. Plaintiff lost no time from his work, called no doctor,

5. TRIAL: ver-
dicts: exces-
siveness: ex-
emplary dam-
ages: new
trial.

and suffered but slight inconvenience. Of course, he was entitled to compensatory damages for shame and humiliation in being assaulted before his family, and in his own

home, but the verdict of \$1,500.00 could not have been for this alone; and if it were, it would manifestly be so excessive as to indicate passion and prejudice. The reduction by half, made by the trial court, was evidently because of an excessive award based on the theory of punishment. That being the thought, the verdict should have been set aside instead of reduced. *Ahrens v. Fenton*, 138 Iowa 559; *Waltham Co. v. Freeman*, 159 Iowa 567.

Again, the answers to the special interrogatories finding Mrs. Doolittle guilty of a conspiracy were without substantial support; and were likewise the result of something aside from the proofs. For this, as well as for the other reason, the general verdict should have been set aside. *Hraha v. Maple Block Coal Co.*, 154 Iowa 710.

V. Moreover, this verdict may and doubtless should be accounted for because of misconduct of the jury. One of the jurors who went into the box acknowledging that he had

6. NEW TRIAL:
misconduct of
jurors: prej-
udice, pre-
sumed.

formed an opinion as to the merits of the case, but who was nevertheless permitted to remain upon the panel, after the submission of the case to the jury and while he was deliberating

with the other members upon the verdict, stated in the presence of his fellow jurors:

“That some time before the trial he had sold a bill of goods at his store to some parties by the name of Van Schoyck; that after the goods were sold, M. B. Doolittle talked with Van Schoyck, and Van Schoyck went out of the store and did not come back, and did not take the goods; that he, Van Schoyck, afterwards bought the goods at the Alliance Store in Cresco; that Lomas afterward told Mr. Doolittle that if he ever got

in his store again he would kick him out; that Doolittle did come into the store afterwards and bought some goods. That some of the jurors stated that they could not see how Mr. Jolly was entitled to anything; and in reply to that the said F. B. Lomas said that Jolly came to Howard county without anything, that he was a Woodman and applied to the Woodmen for help, and in telling of this Lomas said: 'We wrote down to where he came from and asked what kind of a fellow he was, and they wrote back that he was a good fellow, and then we helped him.' During the deliberation of the jury, some of the jurors said that Mr. Doolittle 'is the meanest man that ever lived,' and affiant states that such statements were especially made by jurors F. B. Lomas and L. J. Long. During the deliberations of the jury, jurors F. B. Lomas and L. J. Long said that some time before this case, Mr. Doolittle had sued the town of Cresco for damages, claiming that he had run into a town pump; that when the case was tried it was proved that the pump had been taken out before Doolittle claimed he ran into it. During the deliberations of the jury the foreman of the jury, Geo. Michel, said, that 'if we didn't give him something the people would laugh at us, because if Jolly was not entitled to something, the judge would have thrown the case out.' While the jury was deliberating on the case, L. J. Long, one of the jurors said: 'If we are going to give him something, give him something; there is no use in giving him a few dollars.' "

Some of these matters testified to by jurors so inhered in the verdict that they cannot be considered; but others, extraneous to the verdict, were properly shown by affidavit. *Douglas v. Agne*, 125 Iowa 67; *Hall v. Robison*, 25 Iowa 91; *Doyle v. Burns*, 138 Iowa 439. Some of the remarks by these jurors were highly prejudicial, and had they been offered and received in evidence, over objections, this alone would have been ground for a new trial. More prejudicial still was their recital in the jury room by a juror or jurors not under oath, and without opportunity for cross-examination. Prejudice

will be presumed, and even though there be a doubt about one matter, the verdict is so large and the answers to some of the interrogatories such as to demand that a new trial be awarded as to defendant M. B. Doolittle, upon this ground alone. *Ayrhart v. Wilhelmy*, 135 Iowa 290, and cases last cited.

VI. Other matters are complained of which are not likely to arise upon a retrial. It may be said, however, that the trial court should have submitted the defendants' plea in mitigation of damages to the jury, and that instruction number eleven, asked by defendant, to the effect that agency could not be proved by declarations of the agent alone, should have been given.

7. PRINCIPAL AND AGENT: existence of relation: how proven: declaration of agent.

VII. The cross-examination of certain of defendant's witnesses regarding what Mrs. Jolly said with respect to one of her children being frightened by the assault was improper in that, if cross-examination, the matter was wholly irrelevant. The children were not suing, and if the testimony were competent at all, it would be by reason of the reflex upon plaintiff's mind, that is to say, the fright of his children might perhaps have affected him. But the effect upon his wife of the children's fright was certainly immaterial. Again, testimony from one of these witnesses on cross-examination that Mrs. Jolly appeared to be of a mild and inoffensive disposition should not have been received.

8. ASSAULT AND BATTERY: damages: fright of plaintiff's children.

For the errors pointed out, the judgment must be reversed and the cause remanded for judgment on the special findings in favor of defendant Mrs. Doolittle, and for a new trial as to the other defendant.—*Reversed and Remanded*.

LADD, C. J., GAYNOR and WITHROW, JJ., concur.

LUDOWICI CALADON COMPANY, Appellant, v. THE INDEPENDENT
SCHOOL DISTRICT of Independence, Iowa, et al., Appellees.

MECHANICS' LIENS: Public Building—Abandonment by Contractor—Right of Municipality to Complete—Payments—Bond.
1 A school district may, though not authorized so to do and though protected by a bond taken under Sec. 2779, Code, complete its partially erected building when abandoned by the contractor (the sureties refusing to complete) and may apply the unpaid payments under the contracts to the cost of such completion, even though this defeats the material man in his attempt to establish a lien on the fund under Sec. 3102, Code. The municipality is not forced to an action on the bond to recover the cost of completion.

MECHANICS' LIENS: Public Corporation—Right to Make Payments—Material Men.
2 The right of a material man, under Sec. 3102, Code, to establish a claim against the fund for the erection of a public building, is subject to the right of the public corporation to make payments in accordance with its contract, and it is immaterial whether such payments be in money or in that which is treated as its equivalent.

MECHANICS' LIENS: Municipal Corporation—Payments in Excess of Contract—Burden of Proof.
3 The burden of proof to show that payments, under a contract for the erection of a public building, were in excess of those provided for in the contract, rests on the material man who seeks to establish a claim against the public corporation, under Sec. 3102 of the Code.

MECHANICS' LIENS: Sworn Statement—Who May Make—Qualifications.
4 The "itemized sworn statement of the demand" required by Sec. 3102 of the Code, as the basis for the establishment of a so-called mechanic's lien against a public corporation, is sufficient when made by one who shows therein such general qualifications as are necessary for the verification of a pleading by a party other than plaintiff or defendant.

Appeal from Buchanan District Court.—HON. GEORGE W. DUNHAM, Judge.

MONDAY, DECEMBER 14, 1914.

REHEARING DENIED MONDAY, MARCH 22, 1915.

PROCEEDING to establish a claim for material against a fund alleged to be subject thereto, arising out of a contract to erect a school building. From a decree in favor of the defendants plaintiff appeals.—*Affirmed*.

Cook & Cook, for appellant.

Chappell & Todd, for appellees.

WITHROW, J.—I. On July 6, 1910, the Independent School District of Independence entered into a contract with George A. Netcott for the erection of a school building in the city of Independence. As a guaranty for the performance of his contract, Netcott gave his bond with sureties. Before the completion of the work, Netcott made an assignment for the benefit of his creditors to one Bain. At that time, there had been paid to the contractor on the work and for extras \$38,100.00. In addition to this, about two months after entering upon the work, Netcott purchased from the school district two old buildings for \$202.50, which it was then agreed should be applied on the contract as part payment. Later, insurance was placed on the building at a cost of \$90.00, for the one-third of which Netcott became liable, and this also, it was agreed, should be applied on the contract, payment of the entire amount of the insurance having been made by the district. October 5, 1911, two days after the assignment to Bain, the school district served notice on the bondsmen to complete the work according to the contract, which they refused to do. Thereupon, the officers of the school district took charge of the building, completed it according to the requirements of the contract, expending therefor the sum of \$1,042.12 for materials, and \$1,030.47 for labor. The contract did not in terms authorize the builder to complete the work upon default of the contractor. The contract price was \$46,671.07. Pay-

ments made to the contractor and to material men whose equitable rights in the fund were properly established amounted to \$44,365.98, not including the buildings sold and the insurance. Deducting these items, there remained \$2,072.59, being exactly the amount expended for labor and material in completing the building. If not deducted, there would remain in the control of the district \$232.50 applicable to claims against Netcott, or to the equitable claims of material men. The plaintiff's claim is for \$628.82 for material furnished.

The contention of the plaintiff in the court below and here is:

1. That when the contract does not authorize the district to complete the work upon failure of the contractor to do so, the contract and bond must be construed together so as to require the district to recover from the bondsmen the amount necessary to complete the contract, instead of deducting it from the contract price.

2. That the credit on the contract price of \$232.50 for the old buildings and the insurance, being based on agreements made after the execution of the contract and the commencement of the work, was not contemplated by the contract and should not be allowed.

A third question was raised as to the sufficiency in form of plaintiff's verified claim.

The trial resulted in a finding and decree against plaintiff and it appeals.

II. An important question in the case is the one first stated. The claim is that, as the school district took the bond as it was required to do under Code Sec. 2779, it is conclusively presumed to have relied upon the bond

and the contract in determining its rights, and in the absence of a provision in the contract authorizing it to complete the building upon default of the contractor, when it so does the expense incurred must be collected on the bond and not be deducted from the unpaid part of the contract

1. MECHANICS' LIENS: public building: abandonment by contractor: right of municipality to complete: payments: bond.

price. Supporting this claim appellant relies upon *Baker v. Bryan*, 64 Iowa 561. That case arose on a bond which required the contractor to produce receipts for labor and material used in the building, and that he should pay all claims for material and labor. The contract in the present case is similar in its provisions. In the *Baker* case this court held that construing the bond and contract together, the obligation was for the benefit of the material men and of holders of labor claims. The later case of *Green Bay Lumber Co. v. School District*, 121 Iowa 663, cited by appellee, is distinguished from the *Baker* case by the fact that neither the bond nor the contract exacted payment by the contractor of labor and material claims. But granting to the case upon which appellant relies all that is claimed for it, there immediately arises the fact that appellant has not sued upon the bond, but seeks to recover from the school district against a fund claimed to have been used to appellant's detriment, and without authority in completing the work.

By reason of his insolvency and the assignment for the benefit of his creditors, Netcott was unable to fully comply with the contract. As to this conclusion no question is raised in the record. The sureties on his bond refused to complete the building. It was then in effect a breached contract. The owner was entitled to the benefit of its bargain and to have the building completed at no greater cost to it than the contract price. *Aetna Iron Works v. Kossuth Co.*, 79 Iowa 40; 6 Cyc. 74. Should the cost exceed the balance due, a question as to the liability of the bondsmen would arise, which is not now in this case. The right to complete the building under such conditions cannot be made to depend upon a provision of the contract authorizing such to be done, but rests upon the elemental ground that a party to a contract not broken through his fault is entitled to its benefits; and when an expenditure of money is necessary to protect and complete that which is already in his possession, as a result of part performance, such expenditure may be made and recovery had for it. This

rule is recognized in *Page v. Grant*, 127 Iowa 249. We conclude that the fund held by the school district in excess of that paid on the contract was rightfully applied to the cost of completing the work.

III. The sale of the old buildings to Netcott was with the agreement that the price should be credited on his contract. The liability for insurance was also created with the

2. MECHANICS' LIENS: public corporation: right to make payments: material men.

same agreement as to being credited as a payment. It is urged that by such transactions the school district became only an ordinary creditor of the contractor, as they were not contemplated by the contract as payments which might be made on it; and that under Code Sec. 3102, material men had the right to rely upon the fund up to the contract price, undiminished by any transaction between the parties. The contract provided that payments should be made to Netcott in different sums as the work should be brought to certain fixed stages. The appellant claims that in furnishing the material for which he claims in this action he knew of and relied upon the contract, and he was, therefore, charged with knowledge that under it payments might properly be made to Netcott as the work progressed. There is no proof that at the time of the sale of the buildings or the placing of the insurance such was done in prejudice of the rights of this claimant; on the contrary it appears that those transactions were long prior to the sale of the material by the appellant. There is no proof that at the time of the house and insurance contracts there was, by reason of crediting them upon the account of the contractor, a payment in excess of that which

3. MECHANICS' LIENS: municipal corporation: payments in excess of contract: burden of proof.

the school district at the time had the right to make under its contract; and the burden would be upon the appellant to so show. As we view it, there can be no difference as to the manner in which payment on the contract was made, if the debtor at the time had the right to make it; for in whatever form, whether in money or what would be its

equivalent between the parties, to the extent of their agreement as to its value it would operate as a payment and credit.

IV. In the trial in the lower court the sufficiency of the verification of the claim upon which this action is based was challenged by the defendant, this appellee. The claim was

4. MECHANICS' LIENS: sworn statement: who may make: qualifications. itemized and in that respect admittedly complied with the statute. The verification was by Roy A. Cook, stating that he was a member of the firm of Cook & Cook, "attorney at law and in fact for the claimant," that he was duly authorized to make the statement of demand and file the same; that he had knowledge of the matters set forth in the claim from inspection of the papers, including copies of the contract, freight bills, invoices, statements, etc., and from the statements of the general contractor which had come to his knowledge, and that he knew them to be true as he verily believed. The affidavit stated that he had personal knowledge, and when examined as a witness in the case he testified that before verifying and filing the claim, he submitted it to Netcott, who stated it was correct, with possibly the deduction of a freight claim, as to which he was uncertain. This testimony is not contradicted. While it does not appear that the attorney personally knew of each delivery and item in the charge, yet the invoices which were in his possession, and their confirmation by Netcott when presented to him sufficiently apprized Cook of the correctness of the claim to permit him to verify it, as one having knowledge of the correctness. *Brady v. Otis*, 40 Iowa 97; *Rausch v. Moore*, 48 Iowa 611. While the cited cases consider the sufficiency of the verification of pleadings, the principle is not different from the point in question. The claim was sufficiently verified.

On the whole record the judgment should be and it is—
Affirmed.

LADD, C. J., DEEMER and GAYNOR, JJ., concur.

A. E. MAINE, Appellee, v. SARAH RITTENMEYER, Appellant.

APPEAL AND ERROR: Pleading Evidence—Overruling Motion to

- 1 **Strike—When Nonprejudicial.** Statements of evidence have no proper place in a pleading and may be stricken on motion. The overruling of such motion is nonprejudicial, when the matters stated as evidence are admissible on the trial.

ATTORNEY AND CLIENT: Discharge of Attorney—Employment of

- 2 **New Counsel—Amount of Recovery as Bearing on Value of Services.** In an action by an attorney for services bottomed on the theory that plaintiff had been employed by defendant, had given valuable advice and was then discharged, evidence is admissible (1) that defendant employed other counsel, (2) recovered a verdict and (3) the amount thereof. This is true because (a) the employment of other counsel tended to prove his discharge and (b) the amount of recovery bears on the value of the advice, the action having been brought as plaintiff advised.

ATTORNEY AND CLIENT: Calling Adversary's Attorney as Wit-

- 3 **ness—Competency—Propriety.** It is neither unprofessional nor erroneous in law to call the adversary's attorney as a witness as to the value of services, etc.

ATTORNEY AND CLIENT: Value of Services—Results Obtained—

- 4 **Evidence.** The result secured by the client by following the attorney's advice has material bearing on the value of the services and such results may very properly be embodied in a hypothetical question to an expert on the value of such services.

TRIAL: Improper Argument Versus Improper Argument—Effect.

- 5 One cannot well complain of an improper argument which has been provoked by his own improper argument.

TRIAL: Special Interrogatories—When Properly Refused—Ultimate

- 6 **Fact.** A special interrogatory should not be submitted unless it calls for an ultimate fact.

TRIAL: Special Interrogatories—Refusal—When Nonprejudicial.

- 7 When the fate of defendant's defense rested on one simple question of fact which was clearly submitted to the jury in the instructions and the verdict was adverse to defendant, the refusal to submit a special interrogatory calling upon the jury

for an answer to this ultimate question was nonprejudicial. The verdict necessarily included a finding.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

MONDAY, MARCH 22, 1915.

ACTION for services as attorney resulted in a judgment for plaintiff. The defendants appeal.—*Affirmed.*

Ney & Bradley, for appellant.

W. J. Baldwin and *A. E. Maine*, for appellee.

LADD, J.—The plaintiff is an attorney at law and claims to have been consulted frequently during the two years prior to March 7, 1912, by the defendant concerning the procurement of a divorce from her husband; that he advised her to postpone instituting suit until the death of her husband's father, as thereupon her husband would be likely to inherit considerable property and she to obtain a more liberal allowance as alimony; that her husband's father died in February, 1912, and he had the petition for divorce ready to sign on March 7th following; that she thereupon requested him to defer bringing the action as her husband was doing better. He did so and on the next day she employed Ranck & Messer, attorneys, to bring suit, which they did, and upon trial, a decree of divorce fixing the alimony at \$5,000 was entered. The defendant moved that the portions of the petition in reference to the employment of Ranck & Messer and the decree entered be stricken therefrom. This might well have been done for that it merely pleaded evidence, but as the evidence in any event, as will subsequently appear, was admissible, overruling the motion to strike was without prejudice.

II. The plaintiff testified that he advised delay in bringing the suit for that the defendant's husband was possessed

1. APPEAL AND ERROR: pleading evidence: overruling motion to strike: when nonprejudicial.

of limited or no means and that as his father was wealthy, about ninety years of age, in ill health, and not expected to live long, the husband would be likely to inherit considerable property; and therefore she would be allowed a larger amount as alimony should suit be brought after his death. On the other hand, defendant testified that when she consulted plaintiff, he advised her that she did not have evidence sufficient to justify the granting of a decree of divorce and simply put her off from time to time.

The jury must necessarily have decided whose account of the transaction was correct, but counsel for appellant contends that evidence of the employment of other counsel and the amount finally allowed as alimony was not admissible. Evidence of the employment of other counsel and institution of suit by them established his discharge and was admissible for that purpose at least. And if in consequence of plaintiff's advice the allowance of alimony was larger than it would otherwise have been, evidence thereof would have a direct bearing on the value of the services rendered and for this reason was rightly received. That the allowance may have been procured through other attorneys can make no difference, for the object was not to show what other attorneys had done or the value of their services, but that the advice of plaintiff was such as should have been given and that defendant had derived an advantage therefrom.

III. Counsel for defendant was called as a witness by plaintiff to testify with reference to the custom of charging clients for consultation. He insists that this was unfair practice. The exception might be disposed of by saying that no objection was interposed. If there had been, it might well have been overruled. A juror or the presiding judge may testify and we know of no reason for challenging the competency of an attorney or for construing the

2. ATTORNEY
AND CLIENT:
discharge of
attorney: em-
ployment of
new counsel:
amount of re-
covery as
bearing on
value of
services.

3. ATTORNEY AND
CLIENT: call-
ing adversary's
attorney as
witness: com-
petency:
propriety.

calling of him as a witness by the other side as unfair to his clients. Rather is it a compliment in thus presenting him to the jury as worthy of their confidence in spite of conflicting interests. There was no error.

IV. W. J. McDonald, after qualifying by showing that he was an attorney at law of long experience, was asked a hypothetical question, reciting the facts as testified to by plain-

tiff, and among other things to be assumed by him was that plaintiff advised defendant to delay bringing suit for divorce until her husband's father's death, that no judgment worth

anything could have been obtained before that time and that in consequence of such advice, the suit was postponed until the old gentleman's death, and that then alimony in the net amount of \$4,000 was obtained. This last was objected to on the ground that the evidence adduced did not show that plaintiff had procured any alimony or a divorce and that the only question involved was the value of his services for consultations with the defendant. While the value of services rendered only was involved, the consequence of his advice had an important bearing thereon. As it was competent to show the outcome of following his advice and that the client actually reaped the benefits thereof, this was properly to be taken into account in estimating the value of the services rendered. Similar objections to hypothetical questions propounded to other attorneys were rightly overruled. There was no error.

V. Exception was taken to the argument of the attorney for plaintiff and this is supported by affidavit of counsel for plaintiff and explained by affidavit of counsel for defendant.

From a careful examination of these affidavits, we have concluded that honors were about even. One transgressed the proprieties of fair argument about as much as the other and there is no occasion for interference by this court. Surely if one attorney has declared that his opponent's client is "so crooked that he cannot hide behind a cork screw" and calls

4. ATTORNEY AND
CLIENT: value
of services:
results ob-
tained:
evidence.

5. TRIAL: im-
proper argu-
ment versus
improper argu-
ment: effect.

upon the jury to "look at his little face, he is a crook," it would seem that his antagonist ought to be accorded the liberty of touching a juror's knee and assuring him that his client ought not to be blamed for suing opposing counsel's father-in-law.

VI. Special interrogatories were requested by defendant as follows: (1) "Did the defendant ask plaintiff to commence the suit at once?" (2) "Did the plaintiff, after he refused to bring suit, unreasonably delay the commencement thereof?" (3) "Did the defendant at or about the time of employing other attorneys, ask plaintiff how much she owed him and did he say in reply that she owed him nothing?"

6. TRIAL: special
interroga-
tories: when
properly re-
fused: ulti-
mate fact.

Neither of the first two interrogatories called for an ultimate fact and for this reason were rightly refused. The third interrogatory called for an ultimate fact, for the jury was told that if plaintiff had said to defendant that she did not owe him anything, and she thereupon employed other attorneys to transact her business, the plaintiff could not recover.

7. TRIAL: special
interroga-
tories: re-
fusal: when
nonprejudicial.

This issue was the only one, save that of fixing the amount of recovery, submitted to the jury. Only upon an affirmative response to the inquiry might the jury have found for the defendant. In other words, the employment was undisputed and the defendant would be liable in some amount unless this single defense prevailed. The consequence was that the jury were bound to determine this identical question in the verdict as definitely as though in answer to the interrogatory; as unless the interrogatory were answered in the affirmative, the verdict must have been found for the plaintiff. In these circumstances, we are not disposed to regard the omission to submit the interrogatory as prejudicial error. See *Conway v. Murphy*, 135 Iowa 171; *Haase v. Morton*, 138 Iowa 205.

The judgment is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

D. C. SMITH, Appellee, v. WILLIAM TATE, Appellant.

INTOXICATING LIQUORS: Unlawful Sale—Temporary Injunction

1 —**Failure to Answer or Testify.** Failure of a defendant, in an action to enjoin a liquor nuisance, to file answer or testify in explanation of any of the evidence against him may be considered and given due weight on the question of granting the temporary writ. Evidence reviewed and held sufficient to justify the issuance of the temporary writ.

Appeal from Wapello District Court.—HON. F. M. HUNTER, Judge.

FRIDAY, OCTOBER 23, 1914.

REHEARING DENIED MONDAY, MARCH 22, 1915.

FROM a decree granting a temporary injunction against the unlawful sale of intoxicating liquor this appeal is taken.—*Affirmed.*

Jaques & Jaques and Gilmore & Moon, for appellant.

M. S. Odle and Geo. L. Gillies, for appellee.

WITBROW, J.—I. Proceeding was brought in the district court of Wapello county against Charles Tate, William Tate and C. A. Burns, alleging that they were engaged in the sale of intoxicating liquor on Lot 340, in the city of Ottumwa, and that such premises were being kept, used and maintained by the defendants as a place for keeping intoxicating liquor with intent to sell the same in violation of law. The petition was duly verified, and upon presentation to the court, a hearing on the application for temporary injunction was fixed for November 1, 1912. At that time the defendants appeared and hearing was had, at the conclusion of which decree was entered temporarily enjoining the defendant, William Tate,

from the illegal sale of or keeping for sale intoxicating liquor on the premises described, or elsewhere, in the second judicial district. From that order this appeal is taken.

II. Appellant urges that there was no evidence tending to connect him with the place or with its operation; and that the decree temporarily enjoining him was erroneously entered.

1. INTOXICATING LIQUORS: unlawful sale: temporary injunction: failure to answer or testify.

The trial court in its decree held "that the failure of the defendant, William Tate, to take the witness stand and testify in his own behalf is a circumstance which should be considered by the court in ruling upon the evidence produced in the trial and the case made by plaintiff."

The defendant filed no answer, nor by his own testimony did he controvert the charge of the petition. While it may not be said that a failure to so do is of itself a sufficient warrant for granting a temporary injunction, when the evidence on the part of the plaintiff and the defendant fails to connect the defendant with the alleged wrongful act, yet when there is some evidence tending to connect the defendant with the place, and unlawful sales are shown to have been made, his failure to testify is a circumstance to be taken against him. *Shideler v. Naughton*, 163 Iowa 616. In a like case, where no answer was filed, this court held that the allegations of the petition, not having been controverted, must be deemed true (*Bloomer v. Glendy*, 70 Iowa 757); and this holding was over the objection that the evidence did not warrant the court in entering judgment for plaintiff.

The evidence tended to show that at the place in question, witnesses bought intoxicating liquor, and that it was reputed to be a place where intoxicating drinks could be had. The evidence connecting the defendant with the place tended to show that he had at times been behind the cigar counter, but no one testified to having seen him make sales of intoxicating liquor. A brother of the appellant, himself a defendant in the case, testified that he did not know whether his brother, William Tate, ran a soft drink parlor at the place

in question. His connection with the place in some capacity was shown, and there was evidence tending to show that intoxicating liquor had been purchased there, although the witness did not identify this defendant as the one from whom the purchases were made.

The evidence showed that the appellant William Tate had received shipments of beer at frequent intervals, generally in 250-pound cases, the shipments covering a period from May 28, 1912, to July 20, 1912, and being seven in number, delivered at irregular times from one to three weeks apart. The driver testified that he made all the deliveries at the home of William Tate, which was not the place where the unlawful sales were alleged to have been made. It was also shown that the appellant was a married man, and that there were several members of his family. While intoxicating liquor purchased for one's personal use in not unusual quantities and delivered at his residence cannot be made the basis for a prosecution, the fact that it was intended for his family does not appear in the record, excepting as it may be claimed that such must be inferred from a delivery at his home. Neither does the record show any facts aside from that of quantity and the number of members of his family to indicate that the purchases were or were not excessive. The facts were such, however, as we conclude, that the trial court was entitled to an explanation by the appellant of the various circumstances tending to connect him with the place; and such not having been offered or made, and there having been no answer filed in the case, it had the right under the authorities on the record presented to grant the temporary injunction.—*Affirmed.*

LADD, C. J., DEEMER and GAYNOR, JJ., concur.

M. L. BECKWITH et al., Appellees, v. CORN BELT LAND & LOAN COMPANY, Appellant.

ATTORNEY AND CLIENT: Lien for Attorney Fees—Attempt to Defeat—“Money Due.” An attorney has a lien upon “any money due his client in the hands of the adverse party” and growing out of the action, from the time of giving notice to the adverse party. Such adverse party cannot defeat this lien by satisfying the money demand through a conveyance of real property to the client of the attorney instead of paying the client in “money.” (Sec. 321, Code.)

Appeal from Polk District Court.—HON. HUGH BRENNAN, Judge.

TUESDAY, MARCH 23, 1915.

ACTION to recover attorney's fees resulted in judgment against defendant, from which it appeals.—*Affirmed.*

A. F. Brown, for appellant.

Franklin & Miller, for appellees.

LADD, J.—It appears that Elizabeth Mathews owned a residence at 1533 Vine Street in Des Moines and defendant, a quarter section of land in Lincoln County, Nebraska. They exchanged, the company conveying to her the land and paying to her \$300.00 and she deeding to defendant the house and lot and executing to it a promissory note for \$1,500.00 and securing payment thereof by giving a mortgage back on the land. Thereafter, Mrs. Mathews, who had never seen the land, employed plaintiffs to institute suit against defendant for damages she claimed to have suffered in said exchange and in pursuance of such employment they filed a petition alleging that defendant had fraudulently deceived her and thereby induced her to make such exchange to her damage in the sum of \$—— and caused original notice to be served on defendant. Sometime later, notice that plaintiffs claimed

a lien for their attorneys' fees on the amount owing by defendant was served on it and in the following year, the case was settled, out of court, and dismissed. This was done without the knowledge of plaintiffs and in pursuance of an agreement whereby Mrs. Mathews undertook to convey back the Nebraska land subject to the \$1,500.00 mortgage, pay \$300.00 at the rate of \$4.00 a month with interest and dismiss the suit, when defendant should convey back to her the house and lot in Des Moines. Conveyances were made as agreed, save that at Mrs. Mathews' request, the house and lot were deeded to one Johnson, her former husband, and he executed a mortgage thereon securing payment of the \$300.00 which she was to pay and for which he gave his note. The object of this action is to enforce plaintiffs' lien, if any they ever had, and it is their contention that, notwithstanding the nature of the adjustment by the parties to the original suit, they are entitled to judgment against defendant for the reasonable value of the services by them rendered. The evidence disclosed that the residence property was worth from \$500.00 to \$700.00 and the land \$1,600.00. In exchanging, Mrs. Mathews received property of the value of \$100.00 above the incumbrance she executed and the \$300.00 in cash and conveyed property valued at from \$500.00 to \$700.00. If then she had succeeded in establishing the allegations of her petition, she must have recovered at least the difference, or from \$100.00 to \$300.00, and in settling by trading back, she received this much in value. Sec. 321 of the Code provides that "An attorney has a lien for a general balance of compensation upon . . .

"3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services;"

1. ATTORNEY AND
CLIENT: lien
for attorney
fees: attempt
to defeat:
"money due."

"The money in the hands of the adverse party is such as shall be found to be due in the action or proceeding." *Tiffany v. Stewart*, 60 Iowa 207. And where money is paid through settlement or compromise of the suit, this is treated as "money due" in establishing the lien.

Had defendant paid Mrs. Mathews money instead of property, in settlement, the right of plaintiffs to establish their lien could not be questioned. *Crosby & Fordyce v. Hatch*, 155 Iowa 312. *Cheshire v. Des Moines City Ry. Co.*, 153 Iowa 88; *Smith v. Ry.*, 56 Iowa 720.

The contention of counsel for appellant is that as it conveyed property to her, such lien will not be established. We are not inclined to that view. Had the cause been prosecuted to judgment, recovery, if any, must have been in money and plaintiffs would have been entitled to a lien thereon for the value of their services. Such a prosecution of the action was obviated by the settlement or compromise, and this was because of the injury alleged and in a sense in satisfaction of damages, if any, which may have flowed therefrom. *Cheshire v. Des Moines City Ry.*, *supra*.

The compromise was of the claim of money due regardless of how settled and it was on money due the lien attached. Instead of paying the money alleged to be due, defendant conveyed property of value as stated and we are of opinion that the lien may not be defeated by substituting property in place of money in satisfaction of such a claim. The design of the statute giving an attorney a lien on money due his client from the adverse party is to protect him in the collection, out of the proceeds of the litigation, of the value of services rendered; and for this reason, it may not be defeated by a secret compromise of the parties to the suit and may be established as against anything of value derived thereby on a claim for money due and traceable as a consequence of such services. The payment of money or property in settlement is in satisfaction of the claim for money due and to which the lien

attached and to the extent of the value thereof it will be enforced.—*Affirmed.*

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

JOHN F. DILLE, Appellee, v. O. H. LONGWELL, Appellant.

TRIAL: Action at Law—Injecting Equitable Issue—When Partially

- 1 **Transferred, When Wholly.** A defendant in a law action cannot compel the transfer of the entire cause to the equity calendar by injecting into the cause an equitable issue which does not reach to the whole cause of action. (Sec. 3435, Code.)

PRINCIPLE APPLIED: Plaintiff sued at law on a note calling for interest. Defendant answered that the agreement was that the note should not draw any interest, and that by mistake the one drawing the note inserted the provision for interest. Defendant asked for reformation. *Held*, while the particular issue of reformation should be tried, if demanded, in equity, yet plaintiff on the law issue was entitled to his jury.

TRIAL: Action at Law—Defensive Issue—Transfer to Equity—

- 2 **When Not Required.** An issue which is purely defensive—which goes to the very heart of plaintiff's right to recover and which if found by the jury in defendant's favor effectually forecloses plaintiff's right to recover—presents in a law action no equitable issue, though given a familiar equitable name. (Sec. 3435, Code.)

PRINCIPLE APPLIED: Plaintiff, an indorsee, sued at law on a note, the time of maturity being, "when present indebtedness of Highland Park Co. is paid." Defendant answered that he and the payee were trying to maintain Highland Park College; that it was financially embarrassed; that they agreed that payee should retain a half interest and that he and defendant should jointly attempt to carry on the college and pay its debts and that on the fulfillment of these conditions only was the note to be due; that payee and defendant were not successful; that payee sold out and abandoned the enterprise and therefore prevented any possible fulfillment of the agreement. Defendant prayed for "cancellation" of the note. *Held*, defendant was not entitled to have the cause transferred and tried in equity.

Appeal from Polk District Court.—HON. JAMES P. HEWITT, Judge.

THURSDAY, SEPTEMBER 24, 1914.

REHEARING DENIED THURSDAY, MARCH 23, 1915.

APPEAL from an order overruling a motion to transfer cause to the equity calendar.—*Affirmed*.

Clinton L. Nourse, for appellee.

Clark, Byers & Hutchinson, for appellant.

WITHROW, J.—I. The petition states that on March 24, 1902, the defendant executed and delivered to J. B. Dille his promissory note in terms as follows:

“No. _____ March 24, 1902.

“When present indebtedness of Highland Park Co. is paid, after date for value received, I promise to pay to J. B. Dille or order, Twelve Hundred Fifty and no-100 Dollars, payable at with interest payable annually at the rate of five per cent per annum until paid. Interest when due to become principal and draw five per cent interest. If this note is not paid when due I agree to pay all reasonable costs of collection, including attorney’s fee, and also consent that a Justice of the Peace may have jurisdiction hereon to any amount not exceeding three hundred dollars.

“\$1,250.00.

O. H. Longwell.”

It is pleaded that thereafter said note was assigned by endorsement to Florence F. Dille, and later by her to John F. Dille, by whom this suit is brought; that demand for payment has been made, and no part of the note has been paid, although a reasonable time, about ten years, has elapsed; and that the defendant was an incorporator, officer and principal stockholder in the Highland Park Company when the note was given.

A second count pleads that all of the indebtedness referred to in the note has been fully paid and discharged.

The answer of the defendant pleads a general denial; and in addition, that the note was given as a part of a transaction between the defendant and J. B. Dille, under which the defendant was to purchase from Dille one-half of the interest which Dille then had in Highland Park College. The substance of the agreement as pleaded was that "whereas the said college was heavily indebted, the said Dille should retain practically one-half interest in said college property, and this defendant and the said Dille should carry on the said college, and in the event that they were financially successful in carrying the same on and were able to pay off all of the debts of the said college, then and in that event only, this defendant should pay to the said Dille Twelve Hundred and Fifty Dollars (\$1,250.00) without interest. . . . And it was understood and agreed between the said Dille and this defendant at the time said contract was entered into and at the time said note was signed, that the said note should not be of any force and effect unless the said Dille and the said Longwell should succeed in carrying on the said college successfully and in paying off the debts that then existed; that the said Dille and this defendant were not financially successful in carrying on said college. That they were never able to pay off the debts that existed, but on the contrary a large amount of additional debts had accumulated against said college, and the said Dille in consequence thereof sold and disposed of all of his interest in said college to other parties, and the condition upon which the said note was to become of force and effect was never fulfilled and cannot now be fulfilled."

It was further pleaded that the part of the contract which was in writing, being the note sued upon, does not truly and correctly express the understanding and intention of the parties, in that it provides for the payment of interest at five per cent, whereas it was understood and agreed between the parties that the note should bear no interest; that the written agreement expressed in the note through error or mistake of the person drawing it did not contain such provision; and that

the note does not correctly set forth the understanding and agreement of the parties, and that it should be reformed by striking out the provision with regard to the payment of interest. The defendant prayed for a cancellation of the note based upon the averments of the first division of his answer, and also that it be re-formed so as to be in accordance with the agreement of the parties as to the interest charged.

Following this was a motion on the part of the defendant to transfer the cause to the equity docket, on the ground that equitable issues were tendered in the pleading and prayer for cancellation, and also for reformation of the written instrument. This motion was denied, and from such ruling this appeal is taken.

II. The action was properly commenced by ordinary proceedings. Code Sec. 3435 provides in such cases that "either

party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings."

1. TRIAL: action at law: injecting equitable issue: when partially transferred, when wholly.

It is contended by the appellee that not all the issues raised by the answer are equitable, and that therefore a motion to transfer the entire cause could not properly be sustained; that the answer raises no issue nor pleads any facts showing grounds for equitable action; and that appellant by his neglect lost any rights he may have had to a reformation.

III. The plea of mistake in the execution of the note, which we think is sufficient, and the prayer for reformation, while presenting an issue triable in equity, did not for that reason entitle the defendant to have the entire proceeding heard in equity. That issue did not reach to the whole cause of action, and while, if proper motion is presented asking for such, the trial of the question of reformation should be in equity, such does not entitle the defendant to have the case

transferred, as the plaintiff is in such cases entitled to a jury trial upon the law issues in an action properly commenced at law. *Eller v. Newell*, 159 Iowa 711; *Marquis v. Illsley*, 99 Iowa 135.

As the motion of the defendant covered the entire case, unless the plea of cancellation, which went to the whole cause of action, presented an issue triable in equity, there was no error in denying the motion to transfer.

IV. The prayer for a cancellation of the note is based upon the averments of the answer that the note was not to be of any force or effect unless the parties to it succeeded in

2. TRIAL: action at law: defensive issue: transfer to equity: when not required. carrying on the college successfully and in paying off its indebtedness; that the indebtedness had not been paid, that Dille had disposed of his interest in the college, and that the condition upon which the note was given had not been or could not be fulfilled. There is no plea of any fraud entering into the execution of the note, or of conditions which rendered it invalid at the time of its execution, and such generally is a prerequisite to such right. 1 Story's Equity 694; *Brainard v. Holsaple*, 4 G. Gr. 485, 487. That which is relied upon as a defensive pleading, and also claimed to be of an equitable nature, goes directly to the condition in the note as to its time of payment, that is, "when the present indebtedness of Highland Park Company is paid," with the further provision as to their successful management of the college, and the averment that on account of having disposed of the property the provision as to the payment of its indebtedness cannot be fulfilled. This plea is defensive and does not present an equitable issue in the case, and if proven, may be effectively used in resistance to the action at law upon the written instrument. It is a general rule that a defense asking cancellation may not be made in a pending suit at law upon a written instrument, where the determination of the issue in the law case will definitely settle the rights of the parties. 6 Cyc. 292; 1 Pomeroy Eq., Sec. 179. If the trial and judgment in the law

case will not be conclusive of all possible claims, then the right to a trial in equity of equitable defenses is recognized. *Marling v. B. C. R. & N. Ry.*, 67 Iowa 331; *Twogood v. Allee*, 125 Iowa 59, 61. In the last case cited, in stating the rule, this court said: "Had the case been submitted to a jury upon issues of fact which it could properly consider, *there would yet have remained equitable issues to be disposed of.*" This we take to be the test generally recognized by the authorities in actions where the plea is defensive against a suit at law, and as distinguished from a proceeding brought in equity to secure cancellation. In this case the answer avers that the indebtedness of the college never has been paid, and because of a change in its ownership the condition as to payment never can be fulfilled. These averments go directly to the right of recovery, and if sustained by sufficient proof end the proceeding and accomplish every purpose that would be met by a decree of cancellation. Counsel for appellant in argument say that "if the defendant were successful in his defense that the note never became of any force and effect, and on that account should have plaintiff's action dismissed, he would still have to bring an action in equity or try out the equity issue as to the surrender and cancellation of the note." This conclusion we think is not warranted. A judgment for the defendant in the action at law under the issues presented would in effect be a cancellation of the note so far as it purported to evidence a legal liability, and be fully as effective in protecting the defendant's rights as would be a decree in equity. We are of the opinion that the defense presented was not one which entitled the defendant to have the cause transferred to the equity docket.

V. The conclusions reached render it unnecessary for us to consider the question of laches, or want of proper parties, both of which are raised by the appellee.

The ruling of the trial court is—*Affirmed.*

LADD, C. J., DEEMER and GAYNOR, JJ., concur.

W. C. BARBER, Appellant, v. L. H. DEFORD, Appellee.

INTOXICATING LIQUORS: Statement of Consent—Duty to Can-

1 **vass All Statements—Statutory Construction.** A particular expression in one part of a statute, not so large and extensive in its import as other expressions in the same statute, will yield to the larger and more extensive expressions, when the latter embody the real intent of the legislature.

PRINCIPLE APPLIED: Sec. 2448, Sup. Code, 1913, provides for the filing with the county auditor of statements of consent for the sale of intoxicating liquors in cities having a population of over 2,500 and less than 5,000, and for canvass and findings thereon. No reference is here made to any appeal. Sec. 2450, Sup. Code, 1913, makes no specific mention of the above class of towns, but provides, "*all statements of general consent filed with the county auditor . . . shall be publicly canvassed . . . and its finding as to the result in the city having over 5,000 inhabitants, . . . entered of record.*" Provision is here made for appeals.

Held, the clause of Sec. 2450, apparently limiting therein the authority to make findings only as to cities of "over 5,000," must, in view of the evident intent of the entire statute, yield to the larger and more expressive clause, "*all statements . . . shall be publicly canvassed,*" with consequent right of appeal to all aggrieved parties.

INTOXICATING LIQUORS: Statement of Consent—Filing—With-

2 **drawal of Name—Withdrawal of Withdrawal.** A statement of consent for the sale of intoxicating liquors being filed with the county auditor, the filing thereafter of a withdrawal of a name has the effect *eo instante* of removing said name from said statement, and said name cannot thereafter be reinstated on said statement—in other words, after said statement is so filed, the law will recognize and give force to a withdrawal but will not recognize or give force to a withdrawal of a withdrawal.

NAMES: Christian—Rules to Determine Identity—Intoxicating
3 **Liquors.**

1. The Christian name of a person may consist of one or more letters only.

2. Where one or more *letters* appear as the Christian name they are treated, in the absence of any showing to the contrary, as the Christian name which the person has assumed.

3. There is no presumption that a *letter* or that *letters* stand for *other* names and are not themselves the Christian name.

4. When two or more Christian *names* are used, the middle *name* or letter is quite generally disregarded, not because it is not a part of the Christian name but because not essential to the identification of the person.

5. When the given *name* is written, the middle name or letters may be disregarded in identifying the person.

PRINCIPLE APPLIED: Tested by the above rules, *held*, the following names (first column showing names as appearing in the "poll book," second column showing names appearing on a "statement of consent" for sale of intoxicating liquors) are not the same:

P. McCanna	Patrick McCanna
G. W. Pring	Geo. W. Pring
B. Strange	Basil Strange
C. A. Pray	Chas. A. Pray
F. D. Gray	Frank D. Gray
F. J. Kester	Fred J. Kester
P. J. Casey	Peter J. Casey

INTOXICATING LIQUORS: Statement of Consent—Incorrect Poll

- 4 **Book—Signatures to Correspond—Identity.** If the voter's name appears on the poll book in an incorrect form he may properly sign a liquor consent statement in such incorrect form but the evidence must be such that it fairly appears that the incorrect name on the poll book represented and stood for this particular voter.

PRINCIPLE APPLIED:

1. The name "L. E. McClland" appeared on poll book. One L. E. McClelland claimed this "poll book name" represented him and signed it on the statement of consent.

2. The name "R. H. McCulland" appeared on poll book. One R. H. McClelland claimed this "poll book name" represented him and signed it on the statement of consent.

3. The name "W. B. Osborne" appeared on poll book. One W. D. Osborne claimed this "poll book name" represented him and signed it on the statement of consent.

Held, it could not be presumed, in the absence of evidence, that these three actual voters "guessed" correctly that these three "poll book names," severally, represented them.

INTOXICATING LIQUORS: Statement of Consent—Affidavit to Sig-

- 5 **natures—Foreign Notary.** An affidavit in verification of the signature of a signer of a statement of consent for the sale of intoxicating liquor, reciting as having been made before a notary public

in and for Polk County, Iowa, but whose seal showed him to be a notary public for St. Johns County, Florida, is a nullity.

INTOXICATING LIQUORS: Statement of Consent—Verification of 6 Names—Foreign Notary. An affidavit in verification of the signature to a statement of consent for the sale of intoxicating liquors may be made before a notary public in a foreign state, such notary properly signing his name as such. The presumption that such notary acted *in the county* where he was authorized to act is not overthrown by a caption reading: "State of Iowa, Polk County, SS."

INTOXICATING LIQUORS: Statement of Consent—Signing by 7 "Mark." A voter may sign a statement of consent for the sale of intoxicating liquor "by mark."

Appeal from Polk District Court.—HON. CHAS. S. BRADSHAW, Judge.

SATURDAY, DECEMBER 19, 1914.

REHEARING DENIED WEDNESDAY, APRIL 7, 1915.

A petition of general consent for the sale of intoxicating liquors in Valley Junction, Polk County, Iowa, was canvassed by the board of supervisors of Polk county, and found sufficient. Appeal from such finding was taken to the district court, and the petition again was adjudged sufficient. From the finding of the district court this appeal has been taken.—*Reversed.*

M. S. Odle, for appellant.

Clark & Hutchinson, Jesse A. Müller, Lester L. Thompson and T. L. Sellers, for appellee.

WITHROW, J.—I. The appellee urges that this court is, and that the district court was, without jurisdiction to consider this appeal for the following reasons:

1. INTOXICATING LIQUORS: statement of consent: duty to canvass all statements: statutory construction.

a. Valley Junction is a city having more than 2,500 and less than 5,000 population.

Under Code Supplement Sec. 2450, there is no provision

for any finding by the board of supervisors as to the result of the canvass of petitions under the mullet law in cities of that class, and, therefore, there can be no appeal from the finding of the board, as no authority or duty is created in the board to make a finding.

b. That the cited section, while providing that all statements of consent filed with the county auditor shall after due notice be publicly canvassed by the board of supervisors, limits the power and duty of the board to entering of record its findings as to the result in "the city having over five thousand inhabitants, or the county, as the case may be, and the various towns and townships therein," and by necessary implication excludes cities between 2,500 and 5,000 in population, no reference being made to them, such cities having a different requirement from other cities and towns as to the number of names necessary to authorize the sale of liquor under the mullet law.

c. That Sec. 2448, which provides for the canvass of petitions in cities of the class under consideration and the entry of the findings of record, is complete in itself, and in that section no right of appeal is granted. That such section provides for a canvass of the petitions at a general or special meeting of the board, while Sec. 2450 authorizes, as to the matter which may be considered under it, findings to be made only at a regular meeting of the board.

It is claimed by appellee that by failing to mention cities between 2,500 and 5,000 in population among those expressly named, and as to which the findings of the board of supervisors shall be entered of record, it must be held to have been the intent of the legislature to exclude them.

Code Supplement Sec. 2450, provides that "all statements of general consent filed with the county auditor as provided in the two preceding sections (2448 and 2449 Supp.), shall be publicly canvassed," etc. In that general provision is necessarily included cities of the population in question, the requirements as to which are fixed in Sec. 2448, Supp., unless they

are expressly excepted. Does the omission to include such cities in express terms in the clause "cities having over five thousand population, or the county, and the various towns and townships therein" leave them outside the operation of that section? While it is a settled rule of statutory construction that where general terms of expression in one part of a statute are inconsistent with more specific or particular provisions in another part, the latter will generally control, it is also the rule that a particular expression in one part of a statute not so large and extensive in its import as other expressions in the same statute will yield to the larger and more extensive expressions, when the latter embody the real intent of the legislature. 36 Cyc. 1130 and cases cited. A careful reading of Secs. 2448, 2449, and 2450, Code Supp., leaves no doubt that it was the legislative intent that as to all classes of cases arising under them the right of appeal should be afforded to both parties as they might seem to be aggrieved. While the legislative intent must, if possible, be determined by a construction of the language it has used, where there is conflict of terms in the same section the rule above stated has full application; and in Sec. 2450 the alleged conflict between the general and the particular expressions, in the light of the purpose of the legislature as expressed in the cited sections, is not of such gravity as to compel us to hold that the general provisions must yield to the particular ones.

We conclude that the provision in Sec. 2450 as to the finding by the board of supervisors, and making a record of such, applies to all cases which are covered by the general terms of the section, that the right of appeal is given, and that we have jurisdiction of the cause.

II. By concession made upon the trial of the case in the lower court, it appears that the total vote of Valley Junction at the general election last preceding the circulation of the statement of consent was 412, and that the statements filed contained 352 names. Based on the total vote as shown, the number of signatures required, that is, eighty per cent of the legal

voters in cities of that size, being between 2,500 and 5,000 population, was 330.

Included in the total of 352 signatures are four which are conceded to be duplicates, five whose names do not appear on the poll list, and one who was a non-resident at the time of the circulation of the statement of consent. This concededly reduced the number of signatures to 342. Of this number, seventeen made withdrawals of their signatures; and of this seventeen, upon the submission of the statement of consent to the board of supervisors, nine filed requests for withdrawals of their withdrawals. Two of the remaining number signed by a mark, which was witnessed only by the canvasser who made the affidavit. Seven, whose names appeared on the poll book with only their initials, signed the petition or statement of consent by using Christian names and initials, as follows:

ON POLL BOOK.

P. McCanna
G. W. Pring
B. Strange
C. A. Pray
F. D. Gray
F. J. Kester
P. J. Casey

ON PETITION.

Patrick McCanna
Geo. W. Pring
Basil Strange
Chas. A. Pray
Frank D. Gray
Fred J. Kester
Peter J. Casey

The witness to the name of A. H. Dyke on the petition swore to the same before a person who purported to be a notary public in and for Polk County, Iowa, but the notary's seal attached to the affidavit indicated that he was a notary public in and for St. Johns County, Florida.

The witness as to the name of G. J. Zerwech on the petition made affidavit before a notary who properly signed himself as a notary public in and for Bureau County, Illinois, but at the head of the affidavit appeared the caption: "State of Iowa, Polk County, SS."

It was also agreed that the name L. E. McCelland was

signed by L. E. McClelland; R. H. McCulland was signed by R. H. McClelland; W. B. Osborne was signed by W. D. Osborne, the first of each of said names being as shown by the poll list.

The agreement as to facts simplifies the case. The trial court found the statement of consent to be sufficient. The appellant concisely states the question presented for our determination under the conceded facts as follows:

1. Should the nine withdrawals of withdrawals be considered?

2. Should the seven names in which the initials only were given on the poll books, and the full name written on the petition, be counted?

3. Should the three names appearing alike on both the petition and poll book, but claimed to be spelled in a different manner from what the person who signed the petition usually signed his name, be counted?

4. Should the two names in which there was an alleged defect as to the notary's acknowledgment be counted?

5. Should the two names signed by mark, where the mark was witnessed only by the person circulating the petition, be counted?

The questions raised challenge twenty-three signatures. We will consider them in the order in which they are stated.

III. From the conceded facts it appears that on the 13th day of February, 1911, at eleven o'clock A. M., there were filed with the county auditor statements in writing by seven-

teen persons who had signed the statement of consent, requesting that their names be stricken from it, and be not counted. It also appears that these seventeen withdrawals were on the same day presented to the board, that being the time when the canvass of the statement of consent was made; and at the time the seventeen withdrawals were presented, there were also filed with and pre-

2. INTOXICATING
LIQUORS:
statement of
consent: fil-
ing: with-
drawal of
name: with-
drawal of
withdrawal.

sented to the board of supervisors for their consideration, the written requests of nine of those who had signed the withdrawal statements, requesting that their names remain on the statement of consent. The record contains no other statement as to the time and manner of filing the nine withdrawals of withdrawals, and it must be concluded that the first publicity given to them was at the time they were filed with and presented to the board of supervisors, then sitting as a canvassing board. From these facts we must determine whether the nine withdrawals of withdrawals had the effect of cancelling the prior withdrawals and reinstating the names on the petitions or statements of consent.

IV. In the several cases decided by this court involving the sufficiency of statements of consent to the sale of intoxicating liquors under the mullet law, it has been recognized that the right to withdraw a signature from the statement rests in the person signing the statement, and may be exercised by him up to the time that the canvass of the statement is actually commenced by the board of supervisors. *Green v. Smith*, 111 Iowa 183; *Scott v. Naacke*, 144 Iowa 164; *Lemon v. Drexel*, 152 Iowa 144; *De Board v. Williams*, 155 Iowa 149; *Anderson v. Board*, 156 Iowa 153.

The conclusion reached and announced by this court upon that question has not been the result of statutory construction, for the law regulating the presentation and canvassing of statements of consent has no provision allowing the withdrawal of names, but such conclusion is based upon what has seemed to be a necessary recognition of the right of an individual to change his mind upon a question as to which he has expressed himself, if such be done before the matter is taken up for consideration by the canvassing body whose action upon it is invoked.

In some of the cited cases, under the facts there presented, we have held that withdrawals of withdrawals or cancellation of withdrawals should not be allowed, the reason-

ing employed by the court being that upon the filing of a withdrawal, the effect *eo instanti* is to remove the name from the original petition, and that the attempted cancellation of the withdrawal, if allowed, could have no other effect than to reinstate upon the petition a name which had been removed; in other words, really a re-signing of a name or names to the petition. To add to a petition or statement of consent already filed is not allowed, for no name shall be counted which was not signed thirty days prior to the time of filing the statement of general consent. In discussing this question in *DeBoard v. Williams, supra*, this court recognized the right of the elector to change his mind on any subject as often as he pleases, so long as he withholds his intention or conclusion from the record. But when the statement of consent, with his name thereon, is filed with the auditor, it must remain unless withdrawn, and if withdrawn, his name is no longer to be considered as being upon the petition. This court in that case distinguished it from *State v. Geib*, 66 Minn. 266, which seemed to hold to a contrary doctrine, so far as it applied to the cancellation of withdrawals. In the *Geib* case it was claimed, and the court so held, that if the withdrawals which had been authorized to be made by an attorney in fact and the revocation of the power of attorney which authorized the withdrawals were presented to the canvassing board at the same time, the effect was to recall the withdrawal, as notice of the revocation had been given to the attorney in fact and to the board before any action was taken upon them by the board. In considering that case, this court in the *DeBoard* case noted that the presentation of the withdrawals in the *Geib* case was shown to have been against the wishes and demand of those signing them, and, therefore, not binding upon them; while in our own case, then being discussed, the withdrawals were presented with the express authority of those signing them, and this operated to remove their names as petitioners.

As this court in *Anderson v. Board of Supervisors*, 156

Iowa 153, seemed to leave open the question whether withdrawals of withdrawals should be counted, that case having been decided after the opinion in *DeBoard v. Williams, supra*. was filed, we deem it important to note the facts upon which the decision in the *DeBoard* case was based. In that case the board of supervisors convened for the purpose of canvassing the statement of consent on December 26, 1910, at nine o'clock A. M., at which time the petitions and the larger number of withdrawals were brought before that body, the time of canvassing having, by previous action of the board, been postponed from December 21st to December 26th. On the day fixed, the petition of consent and the petition for withdrawals filed December 26th were presented. After hearing arguments upon law questions presented, and before the canvass had actually commenced, the board adjourned until the afternoon, and upon reconvening, a petition for the recall of withdrawals was presented, containing fifty-one names, following which the board adjourned until nine o'clock of December 27th, at which time the actual canvass was commenced and continued to a conclusion. On the 27th of December, at nine o'clock A. M., ten additional cancellations of withdrawals were filed, and at two o'clock P. M. of the same day, six more were filed. The trial court on appeal, after allowing the cancellation of withdrawals, found the petition to contain twenty-nine names more than a majority of the qualified electors, and, therefore, sufficient. Upon appeal to this court we held the cancellation of the withdrawals should not have been counted, and reversed the holding of the trial court. It will be observed from this conclusion that even though question be raised as to the effect of the cancellation of withdrawals, numbering sixteen, which were filed on the 27th of December, the day after the board met for the purpose of entering upon the canvass, the cancellations filed on December 26th, being fifty-one in number, were, in view of the finding of the trial court, decisive of the result.

From the facts conceded in the present case, it appears

that the canvass by the board was made February 13, 1911, and on that day were presented to that body the petition and withdrawals, which had been filed with the county auditor, and the cancellation of withdrawals, which it appears were first filed with and presented to the board. True, in the *DeBoard* case the withdrawals and cancellation were not presented concurrently, while in the present case such was done, although the withdrawals had previously been filed with the county auditor, the lawful custodian of the petition, and the cancellations had not been so filed; but in both instances, the actual canvass had not been commenced at the time of the filing of the withdrawals of withdrawals. The two cases, therefore, are substantially alike in their facts, and the reasoning which was applied to and controlled the *DeBoard* case has equal application here.

If the reasoning of the *DeBoard* case is sound, and we have no disposition to recede from the position then taken, it must logically follow that, granting that the effect of a withdrawal is to remove the name from the petition after it has been filed with the county auditor, who is by the statute made its lawful custodian, if thus removed there is no means known to the law by which it may be reinstated. While it is true, as heretofore stated, that the right of withdrawal is not of statutory origin, the reasons for recognizing it are well stated in our previous decisions, to which we already have referred. It is urged with some force that if the right of withdrawal be recognized, it should equally be the right in the elector to rescind the act of withdrawing at any time before the petition is actually presented for canvassing by the board of supervisors. Were we to depend alone upon the claim that the right of withdrawal having been recognized by the court, the right to cancel such act should also and for equal reasons be granted, and rest the proposition upon the power of the court to effectuate by construction the purpose of a legislative act, we might with some show of reason reach the end contended for; but if we give force to our previous decisions, and the reasons upon

which they are based, not only in cases arising under the mulct law, but also in county seat removal cases, where the principle which governs is the same, we are bound to hold that after the petition or statement of consent has been filed with the county auditor, as the basis upon which he must publish notice of the intention and request of the petitioners that the privilege to sell intoxicating liquors under the provisions of the mulct law shall be allowed, while withdrawals may be allowed, when such act is completed, the effect is to remove the name or names from the statement of consent, and a cancellation or withdrawal of the withdrawal does not have the effect of reinstating the name. See *Lemon v. Drexel*, *supra*; *Green v. Smith*, *supra*; *Scott v. Naacke*, *supra*; *DeBoard v. Williams*, *supra*; *Willing v. Rye*, 123 Iowa 471; *Loomis v. Bailey*, 45 Iowa 400; *Dunham v. Fox*, 100 Iowa 131.

To reach a different conclusion would require an abandonment of the position taken by this court in many decisions; but we are satisfied that the conclusion now reached is not only in harmony with them, but on principle is right. We have been referred to no decision save the *Geib* case in support of a contrary doctrine, and this, as we have noted, has features which distinguish it from the present case; nor have we been able to find any other case which recognizes the right of cancellation of a withdrawal, under conditions as shown in this record, to be a legal right.

This case is different in its facts from *Riley v. Litchfield* decided at the present term. There the cancellation of withdrawal was filed before the withdrawals and operated as a cancellation of the previous act before it had in any measure become effective.

Some of the judges are of the opinion that as the law now here exacts the filing of the withdrawals with the county auditor, these may and must be laid before the board of supervisors, and that if the revocation thereof is presented at the same time, the revocation will become effective to obviate the with-

drawals, and the names should be counted as on the petition, and that such was the holding in *DeBoard v. Williams*; but the majority are with the conclusion here reached.

V. Should the names of the seven voters which appeared on the statement of consent different from their entry on the poll book, be counted? As earlier noted, the names as signed

3. NAMES : were with the given name in full, as Patrick
Christian : McCanna; while on the poll book the name was
rules to deter- given by initial only, as P. McCanna. Some
mine identity : intoxicating
liquors. of the signatures had two initials, and where
such was used, the signature on the petition had the same
middle initial. The question raised as to this branch of the
case, while presenting some difficulties, has been fully deter-
mined against the counting of such signatures in *Riley v.*
Litchfield, supra.

VI. These names appear alike on both petition and poll book, but are claimed to be spelled in a different manner from that in which the voter usually signed his name. In

4. INTOXICATING that where the voter, in signing the petition,
LIQUORS : adopted the form of spelling his name as it
statement of consent : in- had been entered by the poll clerk, such was
correct poll book : signa- a literal compliance with the statute. In that
tures to cor- case it was conceded that in each instance
respond :
identity.

where the names were so signed, the voter actually did vote, and that the name as listed was intended by the clerk for the name of such voter. This branch of the case also is ruled by *Riley v. Litchfield, supra*. The concession at the time of the trial that the several names were signed by persons bearing different names does not go to the extent of proving the identity of such persons with the ones who actually voted under the names appearing on the poll book. This brings the case within the rule of the cited case, and the names should not have been counted.

VII. The witness to the signature of A. H. Dyke swore to the fact before a person whose certificate recited that he

was a notary public in and for Polk County, Iowa. The seal used in the acknowledgment showed authority to so act in Florida, and overcame the recitation that the acknowledging officer was a notary public for Polk County, Iowa. Authority cannot be found to uphold an alleged official act of a notary public of St. Johns County, Florida, performed in Polk County, Iowa. The name A. H. Dyke on the petition was, therefore, not properly witnessed.

5. INTOXICATING LIQUORS: statement of consent: affidavit to signatures: foreign notary.

The witness to the name of C. J. Zerwick made affidavit before a notary public who signed himself, as such, in and for Bureau County, Illinois, but the caption of the affidavit was State of Iowa, Polk County, SS. With the exception noted, the affidavit was regular in form. In the absence of evidence to the contrary, it is presumed that the affidavit was taken by the notary public in the county where he was authorized to act. The caption or heading does not overthrow this presumption. *Goodnow v. Litchfield*, 67 Iowa 691-696. The name Zerwick coming within this objection was properly counted, and that of A. H. Dyke was not entitled to be considered.

6. INTOXICATING LIQUORS: statement of consent: verification of names: foreign notary.

VIII. The fifth point or query of appellant has not been argued, but we hold that where signatures were by mark, and were proven by the affidavit of the person circulating the petition, such is a compliance with the statute, and that names thus witnessed, if without other objection, should be counted.

7. INTOXICATING LIQUORS: statement of consent: signing by "mark."

IX. We have noted all questions raised by the appellant. We recapitulate, and state the result of our conclusions as follows:

The original statement of consent contained 352 signatures. Deducting the four duplicates, five whose names did not appear on the poll list, and one non-resident, all of which it is conceded should not be counted, there remain 342 names.

From this number should be subtracted seventeen withdrawals, one not properly verified by notary public, seven names which vary from the names on the poll list, and three names which were signed by persons having different names, leaving a net list of 314 names. The number required to grant the petition is 330 names. The statement of consent is insufficient. The finding and decree of the district court is—*Reversed*.

All Justices concur, except as to Paragraph IV, in which a majority concur.

O. W. BARTON, Appellee, v. FRED J. BOIE et al., Appellants.

FENCES: Partition Fences—Drainage Right of Way—Power of

1 **Fence Viewers.** Lands taken for a right of way for a public drainage ditch (Ch. 2-A, Tit. X., Sup. Code, 1913) are simply burdened with an easement—a right in the public to use the land, unhampered and unimpeded, for drainage purposes. Subject to this right, the owner (and he is still the owner) may use the land as he pleases. The mere fact, therefore, that a division line between two landowners lies within the drainage *right of way* but outside the actual channel does not oust the power of the fence viewers to order the erection and maintenance of partition fences on such division line.

Appeal from Pottawattamie District Court at Avoca.—HON. THOMAS ARTHUR, Judge.

WEDNESDAY, APRIL 7, 1915.

IN proceedings before the fence viewers of Valley Township in Pottawattamie County, the board refused an order for the erection, cost and maintenance of a partition fence between plaintiff, Barton, and defendant, Boie.

Plaintiff Barton appealed to the district court and, in a hearing before that tribunal, the action of the board was

reversed and the partition fence was established. Defendant appeals.—*Affirmed.*

Fremont Benjamin and Verne Benjamin, for appellants.

I. D. Shuttleworth and Preston & Dillinger, for appellee.

DEEMER, C. J.—The case was tried on an agreed statement of facts from which we extract the following:

Some years ago a drainage district was established, known as Nishnabotna District No. 5. Included within the district, for the purpose of straightening its course, was the Nishnabotna River, a rather large stream which theretofore had been wholly on plaintiff's land. Plaintiff and defendant owned adjoining tracts of land in section five in the township already mentioned, which land was included in the district.

The engineer on the project, which was finally established, contemplated a change of the river course to the division line between plaintiff's and defendant's land, and recommended that a strip one hundred and thirty-two feet in width be taken for the new river channel. Compensation was awarded to the owners and when the ditch was finally constructed, which was some sixty feet in width, it was wholly upon the plaintiff's land, leaving an acre or more within the right of way which plaintiff could not reach, save by crossing the ditch.

The right of way extended some three or four feet over onto defendant's land for a part of the distance between the two tracts; but no part of the drainage ditch runs over it. Plaintiff's land is west of that belonging to the defendant, and the ditch itself is more than forty feet west of the boundary line. It will thus be noticed that the drainage scheme included but three or four feet of the defendant's west line; that the remainder was taken wholly from plaintiff's land; that the ditch proper is wholly upon plaintiff's land and some-

thing like forty feet from defendant's land. The proceeding was to establish a fence on the true boundary or government line, so that plaintiff might have a fence on the east side of his tract, and could use all of his land, both east and west of the ditch, for stock purposes. The township trustees were of opinion that they could not establish a partition fence at any place save on the government line, and that, as the land at this point had all been taken as part of the drainage scheme, they could not establish the fence over the land for the reason that it would or might interfere with the drainage, and that they had no jurisdiction of the matter because the county or the drainage district in legal effect owned the land upon which it was proposed to erect the fence.

The district court reversed the finding and made an order that the fence be constructed. The appeal is from this ruling.

Of course, a partition fence must be established upon the true line, between two tracts of land; and defendant contends that as the land on this line between the parties has already been appropriated by the county or drainage district, no order can or should be made establishing a fence at that point. This depends upon the nature of the title held by the county or by the drainage district, and its power over the same after the establishment of the district. Secs. 1989-a1 and 1989-a5 of the Code Supplement, 1913, provide that the board of supervisors may establish drainage districts for the purpose of straightening natural water courses upon plans recommended by an engineer, and may award damages to any owner whose lands are affected thereby. Sec. 1989-a6 contemplates the taking of a right of way through and over lands and for an award of damages to the owner when this is done; and Sec. 1989-a21 provides that:

“Whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be

the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed as hereinbefore provided; provided, however, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act, or the negligence of his agent or employe, or if the same is filled and obstructed by the cattle, hogs or other stock of such owner, employe or agent, then the cost thereof shall be assessed and levied against the lands of such owner alone."

It will be observed that the taking is for a public purpose and that an easement is created upon the land included in the right of way for the purpose, in this case, of establishing a new channel for the river and to take care of the excavated material, subsequent erosion of the stream, and other matters necessary to the maintenance of the new channel for the stream. Original boundary lines were not eliminated, and continued use of the land taken by live stock is recognized if not expressly authorized by the section of the statute last quoted. There is no provision for fencing a drainage ditch or the right of way taken for the new channel of a natural stream.

An adjoining owner might fence his side of the right of way but he could not compel the other to contribute to the

expense thereof under the partition fence statute, because it is not, or may not be, on the true government line. And if one fenced his side at his own expense, the others would have the advantage of that fence as well as the use of the right of way and a way to reach and to have the advantage of access to a natural stream which he did not theretofore have.

But it is said that the erection of the fence in this case will interfere with the use of the right of way and take from the board of supervisors the control which the statute gives it of using the right of way for drainage purposes. This is largely theory, for there is absolutely no proof in this case that the fence will be the slightest hindrance to the improvement. What the rule might be, were the true boundary upon a berm, or near the channel of the ditch, we have no occasion now to determine. Nor need we say that the board of supervisors *may* not, if the fence is built and emergency demands, order the removal of the fence. It is enough to say that this record discloses affirmatively that the fence, if built upon the true line, will not in any way interfere with the easement over the land for drainage purposes.

Of course, the board of supervisors has the right to go upon the land and to use it for drainage purposes in the consummation of plans already established; but the statutes contemplate that the owners of the land from which the right of way was taken retain ownership and the right to use the property in any way not inconsistent with the carrying out of the plans for the drainage district. The quite universal rule, where an easement over land is created, is that the owner retains the right to use it in any way not inconsistent with the easement nor interfering therewith. *Henry v. R. R. Co.*, 2 Iowa 288; *Conklin v. R. R. Co.*, 28 N. E. (Mass.) 143; *Plank Road Co. v. Braden*, 51 Am. St. 759. That this right of way is a mere easement, see *Stuhr v. Butterfield*, 151 Iowa 736.

No proper claim is or was made in the court below, or in this court, that the county or the drainage district, one or

both, were necessary parties to this proceeding; hence, we do not consider that proposition. It follows that the boundary line between plaintiff's and defendant's land was in no manner changed by the drainage proceedings; that plaintiff is entitled to have a partition fence established on that line unless it in some manner appears that to do so would defeat, hinder or impede the rights which the county or drainage district has in the right of way; and that, as there is no showing whatever that the establishment of the fence would in any way interfere with paramount rights for drainage purposes, the trial court was right in ordering the establishment of the fence. Its judgment is therefore—*Affirmed*.

GAYNOR, EVANS and SALINGER, JJ., concur.

PRESTON, J., took no part.

CHRIS. J. BISGAARD, Appellee, v. F. E. DUVALL, Appellant.

FALSE IMPRISONMENT: Liability—Instigating Arrest—Insufficiency of Showing. A person who causes, instigates and procures an unlawful imprisonment is liable in damages therefor. Evidence reviewed and held insufficient to show liability.

PRINCIPLE APPLIED: Plaintiff was taken into custody, without a warrant, as an insane person. The defendant, at the request of the physician member of the commissioners of insanity, had reported to said physician the condition of plaintiff. Later, the physician directed the sheriff to arrest plaintiff. The sheriff started for the farm where plaintiff lived, fully intending to arrest him. At the farm, the defendant, at the request of the sheriff, pointed out plaintiff and said: "That man has given us lots of trouble. I want you to take him and throw him in. He is dangerous." The arrest of plaintiff had the approval of defendant. *Held*, insufficient to show liability on the part of defendant.

FALSE IMPRISONMENT: Instigating Arrest—Evidence—Admissibility. In an action for false imprisonment of plaintiff without warrant, as an insane person, wherein defendant denied having caused the arrest, evidence is admissible (a) as to what the physician member of the commissioners of insanity said to de-

ing employed by the court being that upon the filing of a withdrawal, the effect *eo instanti* is to remove the name from the original petition, and that the attempted cancellation of the withdrawal, if allowed, could have no other effect than to reinstate upon the petition a name which had been removed; in other words, really a re-signing of a name or names to the petition. To add to a petition or statement of consent already filed is not allowed, for no name shall be counted which was not signed thirty days prior to the time of filing the statement of general consent. In discussing this question in *DeBoard v. Williams, supra*, this court recognized the right of the elector to change his mind on any subject as often as he pleases, so long as he withholds his intention or conclusion from the record. But when the statement of consent, with his name thereon, is filed with the auditor, it must remain unless withdrawn, and if withdrawn, his name is no longer to be considered as being upon the petition. This court in that case distinguished it from *State v. Geib*, 66 Minn. 266, which seemed to hold to a contrary doctrine, so far as it applied to the cancellation of withdrawals. In the *Geib* case it was claimed, and the court so held, that if the withdrawals which had been authorized to be made by an attorney in fact and the revocation of the power of attorney which authorized the withdrawals were presented to the canvassing board at the same time, the effect was to recall the withdrawal, as notice of the revocation had been given to the attorney in fact and to the board before any action was taken upon them by the board. In considering that case, this court in the *DeBoard* case noted that the presentation of the withdrawals in the *Geib* case was shown to have been against the wishes and demand of those signing them, and, therefore, not binding upon them; while in our own case, then being discussed, the withdrawals were presented with the express authority of those signing them, and this operated to remove their names as petitioners.

As this court in *Anderson v. Board of Supervisors*, 156

which judgment was rendered, and defendant appeals.—*Reversed.*

J. M. Graham, Ross & Kerberg, and Willard & Willard,
for appellant.

Mantz & White and H. M. Boorman, for appellee.

DEEMER, C. J.—The petition was in two counts. The first charged the defendant with having wrongfully and unlawfully discharged plaintiff and his wife from his employ, he, defendant, having by oral contract engaged them to work upon his farm for the period of one year from and after March 12, 1912, agreeing to pay the plaintiff \$30.00 per month, and his wife, \$10.00 per month, and to furnish them a house in which to live and board for the period of the contract. The second was for an alleged false, malicious, and unlawful arrest and detention of plaintiff as an insane person, by the sheriff of Audubon County, at the instigation of the defendant.

Defendant denied the employment of plaintiff and his wife for any definite length of time, and pleaded that he discharged plaintiff for good and sufficient cause. He denied that he caused the sheriff of Audubon County to arrest the plaintiff, and averred that he had nothing to do with the arrest. He also pleaded that he had reason to believe from plaintiff's actions and conduct that he was insane, and that his sanity should be inquired into; that he informed one Dr. Brooks, the physician member of the board of commissioners of insanity of Audubon County, Iowa, and also plaintiff's personal physician, of the things he had learned and observed regarding plaintiff's conduct, and requested his advice with reference thereto. That he gave this information to the physician in good faith and without malice for the purpose of guarding his (defendant's) family, with whom plaintiff was then living, and for plaintiff's own benefit.

He averred that his communication with the physician

was privileged, was true, and made for good motives, and without malice. He also pleaded a settlement with plaintiff.

The case was tried on these issues, and, as the jury eliminated the first count of the petition by its verdict, we have nothing to do with the issues raised thereby, save as they may have an indirect bearing upon the second count of the petition. The jury found that plaintiff was falsely and unlawfully arrested by the sheriff of Audubon County, and that defendant was responsible for this arrest; and although plaintiff was under restraint for but a few hours, awarded him damages in the sum of \$2,000.00. It is said that these damages were all compensatory, and that nothing was allowed by way of punishment.

Something like twenty-eight errors are assigned; but as the argument centers around eight main points, we shall confine our discussion to what seem to be the material and controlling propositions.

It is conceded that plaintiff was taken into custody by the sheriff of the county without a warrant, as an insane person or as one supposed to be mentally unsound; that he was

1. FALSE IM-
PRISONMENT:
liability: in-
stigating ar-
rest: insuffi-
ciency of
showing.

taken from the farm where he was living to the town of Audubon, placed in jail for an hour or so, then released and taken back to the farm, and that no complaint or information was ever filed by anyone against him.

Defendant contends, however, that he had nothing to do with the arrest; that he did not instigate it; and that all he did was to inform the physician member of the county board of commissioners of insanity as to what he had observed of the conduct and actions of plaintiff at his (the doctor's) request; and that the doctor on his own motion sent the sheriff out to arrest the plaintiff, and in all things directed the sheriff as to how to proceed and as to what to do with plaintiff.

The sheriff said that Dr. Brooks suggested to him that he make the arrest; that he had no talk with defendant about it until after he concluded to make the arrest; that, when he

went to the farm where plaintiff and defendant were both living to make the arrest, defendant said to him (the sheriff) "That man has given us lots of trouble. I want you to take him and throw him in; he is dangerous." The sheriff said that when he left town (Audubon), he did so with intent to bring plaintiff back; that he took his deputy with him and expected to make the arrest; and that nothing was then said by defendant about making the arrest. After the arrest was made, he (the sheriff) told defendant to come in the next day and to bring two witnesses (naming them) with him. The only testimony tending to connect defendant with the arrest is some kind of an inference that he (defendant) gave some information to Dr. Brooks which led thereto; or that, at the time the arrest was made, he advised the officer to do so, or pointed out the man, or approved of the arrest. As to this latter claim, the most that can be said is that defendant expressly approved of the arrest, although there is no showing that he directed it, or that he was responsible therefor.

The officer testified that he made it at the suggestion of the doctor; that he went out to arrest plaintiff and did so, and there is no showing whatever that what defendant said or did had the slightest thing to do with the arrest. The mere fact that defendant pointed out the plaintiff and expressed the opinion that he should be arrested does not make him liable if the person who made the arrest did so on his own motion or at the instigation of another. *Hopkins v. Crowe*, 7 Car. & P. 373; *Burns v. Erben*, 1 Rob. (N. Y.) 555; *Veneman v. Jones*, 20 N. E. (Ind.) 644.

In the instant case, the arrest was made at the instigation of Dr. Brooks, and there is no showing that defendant did more than to report conditions as he found them to the doctor at his (the doctor's) request. The singular thing about this record is that, when defendant offered to show what the doctor said to defendant about reporting plaintiff's condition as indicating his mental condition, and as to what he

2. 7. FALSE IM-
PRISONMENT:
instigating ar-
rest: evi-
dence: admis-
sibility.

reported to and said to the doctor just prior to plaintiff's arrest, the trial court sustained objections to questions calling for this information on the ground that it was hearsay, immaterial and irrelevant.

Manifestly, these rulings were erroneous and highly prejudicial, as they went to the very vitals of the case. In so far as this record discloses, the arrest was instigated by Dr. Brooks alone, and it is not shown that defendant had any such connection therewith as to make him liable. The most that can be said for it is that it shows that at the doctor's request, defendant truthfully reported conditions as he found them, and that the doctor, on his own motion and without any request or indication from the defendant that he wished him to do so, had the sheriff of the county arrest the plaintiff. Under such a showing, no recovery could be had under the law.

3. WITNESSES:
impeachment:
inconsistent
statements:
witness con-
fined to
limits of
question.

III. A witness called to impeach the defendant was permitted over defendant's objection to detail other things which were said, or were claimed to have been said, at a certain time not included in the foundation question, and not in any sense rebuttal.

These extraneous matters were highly prejudicial and should not have been admitted. The law upon this proposition is so well settled that we need not do more than state it. Other rulings on testimony are objectionable, but as they are not likely to be repeated on a retrial, we do not set them out.

IV. [The trial court in its instructions submitted the case on the theory that plaintiff was arrested for some criminal offense, and over defendant's exceptions and objections stated

4. FALSE IM-
PRISONMENT:
insane: arrest
without war-
rant: law
applicable.

the law applicable to such arrests. This was an unjustifiable departure from the issues made by the pleadings and was manifestly prejudicial to the defendant. In its thirteenth instruction, the court departed somewhat from its other

instructions, which related to arrests for criminal offenses, and gave the following rule as to the arrest of insane persons:

"13th. In regard to persons claimed to be insane the statute provides that an information under oath must first be filed and that then the commissioners of insanity may issue a warrant requiring that such person be brought before them for investigation upon such charge, and there is no statute which provides that anyone who is claimed to be insane shall be taken into custody in any other way except upon a warrant issued as above provided. And under both of these statutes or either of them, you are instructed that the arrest of this plaintiff, without a warrant for his arrest having been issued, was an unlawful arrest."

This instruction is complained of, and we are constrained to hold that the complaint is good.

An insane person stands upon a different plane from that of a criminal, and for his own good, as well as for the protection of the community, he may often be restrained by any person, especially by anyone having an interest in him, or, by one whose safety may depend upon his detention, may be taken in charge without a warrant. The restraint of an insane person or of a person claimed to be insane is not designed as a punishment for an act done, and, as said in *Chavannes v. Priestley*, 80 Iowa 316, 320:

"It is not a case in which he is adjudged at fault, or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. The misfortunes of citizens sometimes place them where, for their care and preservation, restraints are necessary, and *such restraints are even justified at the hands of private persons*. They are not in such cases 'deprived of liberty,' within the meaning of the constitution; and plaintiff bases his claim in this respect upon the constitutional

provision that 'no person shall be deprived of life, liberty or property without due process of law.' "

It is well established that an insane person, without any adjudication, may lawfully be restrained of his liberty for his own benefit, either because it is necessary to protect him against a tendency to suicide or to stray away

5. FALSE IM-
PRISONMENT:
insane: arrest
or detention
without war-
rant: right to
make.

from those who would care for him, or to protect others from his assaults or other depre-
dations, or because proper medical treatment
requires it. Cooley on Torts, 3rd Ed. Vol.

1, p. 313; *People ex rel. Peabody v. Chanler*, 25 L. R. A. (N. S.) 946, 89 N. E. 1109.

Of course, all such arrests or restraints must be reasonable and in good faith, and instructions as to such restraints should be carefully guarded. But it is manifestly erroneous to say, as the trial court did in this case, that an insane person cannot be taken into custody or restrained in any other way than upon a warrant issued as prescribed by law. There was a claim in this case that plaintiff was taken into custody upon the suggestion of Dr. Brooks because he was insane and was likely to do violence to himself and to others, and the law upon that subject should have been given to the jury, and the court should have permitted defendant to introduce testimony in support of his theory of the case.]

V. Misconduct of plaintiff's counsel in the examination of jurors on their *voir dire* and in argument of the case to the jury was made a ground for a new trial. As the case

must be reversed on other grounds, it is not
6. APPEAL AND
ERROR: argu-
ment: wealth
and poverty of
litigants.

necessary to do more than say that counsel
went too far in bringing plaintiff's poverty
and defendant's wealth before the jury, and

in attempting to inflame the passions and arouse the sympathies of the triers of the facts. Upon a retrial, these should not be repeated. We have had some difficulty in understanding the case because of the method in which it was tried; but

the whole record indicates that defendant did not have a fair trial, and was not permitted to introduce testimony in sup-

2. 7. FALSE IM-
PRISONMENT:
instigating ar-
rest: evi-
dence: admis-
sibility.

port of his defense. There is scarcely a scintilla of testimony tending to show that defendant had anything to do with plaintiff's detention and arrest, and he was not given the opportunity to show his connection therewith. He was not permitted to show what Dr. Brooks said to him about reporting plaintiff's conduct or what he said to the doctor, or what, if anything, he advised the doctor to do about arresting the plaintiff or taking him into custody. The officer testified that he made the arrest at the suggestion of Dr. Brooks, and that defendant, so far as he knew, had nothing to do with it.

On the instructions as given, there should, as we think, have been a verdict for the defendant. The jury specially found that the defendant was not actuated by malice in what he did, and that he was justified in discharging plaintiff from his employ, thus indicating that the arrest and detention of plaintiff was not a method adopted by defendant to get plaintiff off his (defendant's) farm.

For the errors pointed out, the judgment must be and it is—*Reversed*.

EVANS, PRESTON and SALINGER, JJ., concur.

T. H. HOWARD, Appellee, v. THE NATIONAL FRENCH DRAFT HORSE ASSOCIATION et al., Appellants.

P. SHEHAN, Appellee, v. Same Defendants, Appellants

ANIMALS: Pedigree or Certificate of Breeding—Fraud in Issuance—

- 1 **Cancellation—Innocent Party.** A "certificate of the breeding" of an animal issued by an association engaged in such business is subject to cancellation for fraud in its original issuance, even against one who in good faith purchased such animal in reliance on such certificate and received an assignment of the certificate. Such certificate is a proclamation to all the world that it speaks the truth. If in fact untrue and such certificate is irrevocable,

then the fraud would be perpetuated. It is unthinkable that the law would commit a fraud by perpetuating a fraud.

EQUITY: Jurisdiction Retained for Full Settlement of Controversy.

- 2 Equity, having obtained jurisdiction of a controversy, will retain it under a general prayer for equitable relief and do full justice and end the litigation, if possible, even though in so doing it may pass on matters ordinarily cognizable at law.

PRINCIPLE APPLIED: An association engaged in certifying to the breeding of draft horses, and failing to exercise due care but intending no wrong, was induced by fraud to certify to the breeding of a certain animal. Plaintiff bought the animal and took an assignment of the certificate in good faith reliance thereon. Later, the association secured possession of the certificate and claimed the right to cancel it for the fraud in its issuance. Plaintiff in equity sought to prevent the cancellation. *Held*, the defendant had the right to cancel the certificate, but inasmuch as plaintiff had been damaged by the fabricated certificate, the equity court would retain jurisdiction, *assess the damages against defendant*, and end the litigation.

ESTOPPEL: Representations Not Known to be True, Made as of

- 3 **Knowledge—Reliance Thereon—Damage.** Representations made as of one's own knowledge, which he does not know to be true, and which induces another to part with his money or property, fixes liability. The maker will be estopped to plead that he did not intend to defraud. Emphatically true is this when the representations are made for a consideration and without due care.

PRINCIPLE APPLIED: (See No. 2.)

DAMAGES: Remoteness—Infinity of Causes—Animals—Fabricated

- 4 **Pedigree—Foals.** Remote damages cannot be recovered. So held in the case of the foals of a mare with a fabricated pedigree.

PRINCIPLE APPLIED: An association, engaged in the business of registering horses, was induced, through gross deception, to issue a certificate attesting to the breeding of a certain mare. The certificate was false. Plaintiff purchased the mare in good-faith reliance on the certificate, paying \$500, which would have been her value had the certificate been true. As it was, she was worth \$200. Plaintiff bred the mare. Damages were claimed for both the lessened value of the mare and her foal. *Held*, the lessened value of the mare was proximate, that of the foal too remote for recovery.

Appeal from Jefferson District Court.—HON. D. M. ANDERSON,
Judge.

WEDNESDAY, APRIL 7, 1915.

THE opinion sufficiently states the case.—*Affirmed.**Leggett & McKemey*, for appellants.*Charles C. Heninger* and *Craik & Craik*, for appellees.

WEAVER, J.—The petition filed by the plaintiff Howard states that the defendant is a corporation engaged in the business of registering horses and issuing certificates of breeding upon application made to it for that purpose and payment of certain registration fees; that in September, 1908, one DeClow obtained the registration by defendant of a certain mare, Flora; that she was so registered as No. 17322 and the corporation issued to him its certificate thereof purporting to evidence the pedigree of the mare. He further alleges that, after such registration and relying thereon as a correct and truthful representation, he purchased the mare from DeClow, who also assigned and transferred to him the certificate of registration. Thereafter, in the year 1911, plaintiff applied to defendant to obtain the registration of a colt, Dinah, produced by the mare Flora, and with such application presented his certificate of Flora's registration; but the defendant without just cause not only refuses to admit the colt to registry but retains the original certificate and refuses to return or surrender it to plaintiff and threatens to cancel and destroy it, to his irreparable injury. On this showing, he prays a writ of injunction restraining defendant from canceling or destroying the certificate and for such other and further relief as he may be found entitled to in the premises. In an amendment or supplement to his petition, plaintiff pleads a substantially similar state of facts as to a colt Edna, produced by the mare Flora in the year 1912, for the registration of which he has applied to defendant and made tender of the necessary fees; but defendant without cause refuses to make or certify such registry. The certificate issued for the mare

Flora is to the effect that upon the application of DeClow there had been recorded in the National Register of French Draft Horses "The mare Flora No. 17322." It also describes the animal, states the date of her foaling and the names and registry numbers of her sire and dam, together with names and registry numbers of the sires and dams through which the alleged pedigree of each is traced. The name of the breeder of Flora is given as John Schroeder of Harper, Iowa. The instrument is signed by the secretary of the company or association and his signature is attested by a corporate seal.

Answering the petition, the defendants admit the corporate capacity of the association and that it is engaged in the business of registering and issuing certificates of breeding for pure bred French Draft horses upon application made to it for that purpose and payment of a prescribed fee therefor. They admit registering the mare Flora upon the application of DeClow and issuing to him a certificate thereof and that such certificate is now in their possession. They further admit that plaintiff applied for the registration of the colt Dinah and the colt Edna, that the applications were denied and that defendants refuse to return the original certificate of the registration of Flora to the plaintiff. In justification of their actions in this respect, defendants further plead that while the application of DeClow for the registration of the mare Flora was in due form and contained representations which, if true, entitled her to registration, said representations were falsely and fraudulently made, and as a matter of truth and of fact, the mare was not eligible to registry and she had not the breeding or the pedigree claimed for her, whereby a fraud was perpetrated upon the association; and, said mare having thus been fraudulently registered, her colts Dinah and Edna were ineligible and the applications for their registry were rightfully refused. Defendants therefore pray for the dismissal of plaintiff's petition and for a decree authorizing them to cancel the certificate No. 17322 and for such other and further relief as the court may find equitable.

Attached to the answer is a copy of the application upon which the mare Flora was admitted to registry. It sets forth in substance the same statements which appear in the certificate and is signed by the names "John Schroeder, breeder," and "John Schroeder, owner," and is verified by the affidavit of John Schroeder. The defendant's Rules of Entry are also set out and provide, among other things, that to make a mare eligible to entry in the National Register of French Draft Horses she must have four "top crosses" in each case by sires recorded in said National Register. The rules further provide that all applications shall be sworn to and shall be accompanied by affidavit of the breeder of each dam, and that if any person wilfully misrepresent any of the material facts, or shall sell or barter any horse as recorded which has not been registered, he shall be liable to be excluded from the register.

In reply, the plaintiff pleads that defendants, by their laches and negligence, are estopped to deny the truth or validity of the registration and cannot rightfully cancel such certificate or deny registration to the colts of the mare so certified.

The other case named in the caption of this opinion—*Shehan v. National French Draft Horse Association et al.*—is in all material respects similar to the one above stated. At the time the mare Flora above mentioned was admitted to registry by the defendant, it also admitted another mare, Maud No. 17321, upon application of the same person and upon evidence of the same character that she had been bred and reared by John Schroeder of Harper, Iowa, who was also breeder of her first, second, third and fourth dam, each being a registered animal. The mare was sold to Shehan, upon whose application defendant admitted to registry a colt, Thorney No. 20888, foaled by Maud. Thereafter Shehan applied for registry for two other colts produced by Maud. The application was denied on the ground that the registry of their dam had been fraudulently obtained and defendants refused to return the certificate to the owner and proposed to cancel it.

Shehan brought suit to restrain such action and for such other relief as to the court should appear equitable. The same defense was pleaded as in the first described case. By agreement, the cases were tried together.

Upon hearing the evidence, the court ordered the cancellation of the certificate of registry in each case as having been obtained by fraud. It found, however, that the plaintiffs had purchased the mares in good faith and in reliance upon the registry and certificate of breeding issued by the association, and by reason thereof had paid an increased price for the animals, and that while the court ought to and would permit the cancellation of such registry and certificates, yet it would also require the defendant to respond in damages which plaintiffs sustained in the purchase of the dams Flora and Maud, and a recovery of \$300.00 was allowed in each case. Damages by reason of the colts not being eligible to registry were thought by the court to be too remote and none were allowed. Judgment was entered accordingly. Both parties appeal. The appeals of the defendants being first perfected, they alone will be spoken of as appellants in the further progress of this opinion. The appeals in the two cases have been submitted upon the same record and will be disposed of in one opinion.

The evidence tended to show without material controversy that the mares had been reared by Schroeder, who knew little or nothing about their pedigree. He sold Maud to one Vercheval, who in turn sold her to a man known as Brown. Shortly after this, Schroeder sold Flora to Brown. In neither of these sales was the animal represented or described as registered or eligible to registry. Brown either purchased the animals for DeClow or later sold them to him. A week or two after Brown acquired them, he went to Schroeder and asked him to sign a paper, saying, "It is only a transfer to show who I bought the mares from." After some hesitation, Schroeder signed and swore to the affidavit. He says now as a witness

that he had no knowledge or information that the paper was to be used in procuring a registry of the mares and that, to the best of his knowledge and belief, all that part of the paper which represents him as saying that he was the breeder of the first, second, third and fourth dams of the mares and knew of their pedigree and breeding was then blank and must have been inserted therein after he made and delivered the instrument and without his knowledge, consent or approval. He was not in fact the breeder of said dams and had no knowledge with respect thereto. On the contrary, it was shown without serious dispute that neither the mare Flora nor Maud was eligible to registry under the rules of the association. It is further shown with practical certainty that these registries were obtained by the fraud of Brown alone, unless it may be inferred that DeClow was implicated therein, and that the plaintiffs Howard and Shehan purchased the mares in good faith without notice and in reliance upon the defendant's certificate of registration. Howard paid \$525 for Flora and Shehan paid \$500 for Maud, and the evidence tends to show that these would have been about their fair market values as registered animals, and that in each case the market value of the animal, if unregistered and ineligible, was about \$300 less. At the commencement of this suit, Maud had three and Flora two living colts still owned by their respective breeders, and in each instance the value of the colt as unregistered and ineligible to registry was very materially less than it would be if the registration of the dam was maintained and registry of such colts was allowed. In short, it is to be said of the main facts in these cases that there is room for little if any doubt, and the question of law is whether the plaintiffs are entitled to any remedy or relief against the defendant association, and if so, whether the same has been properly applied in the decree entered by the trial court.

I. First perhaps in natural order of consideration is plaintiffs' appeal from that portion of the decree which au-

thorizes and directs the cancellation of the registry of the

1. **ANIMALS :** mares Flora and Maud and the colt of the
pedigree or latter animal. It is argued for plaintiffs that
certificate of breeding: such registry and certificates are conclusive as
fraud in is- against the association and that it should not
surance: be allowed in law or equity to stultify its own
cancellation: record to the injury of one who has purchased a registered
innocent party.

animal in reliance upon such record. There is a measure of justice in such contention, and if the dispute were one affecting only plaintiffs and the association, the propriety of applying the rule so stated could not well be denied. But the issue is of a broader character. The intent and proper purpose of the registry and certification of these mares was not for the benefit of plaintiffs alone, but for the benefit of all persons who may at any time become purchasers of such animals or of the colts produced by them. One of the principal objects of the association, we may assume, is to promote the pure breeding of the French Draft horse and to afford evidence to the world that a horse which it has registered and certified is the product of such breeding. The value of such evidence depends, of course, upon the extent to which the association justifies the confidence of buyers and breeders that its work is done with care, accuracy and honesty. It is, perhaps, not humanly possible that a register of this kind shall be always and absolutely free from mistake or that an ineligible animal shall not at times by fraud or otherwise be admitted thereto. If such mistakes are not the subject of correction in some form and a fraudulent entry may not be vacated or cancelled by some proper proceeding for that purpose, then the law which is designed to prevent fraud and deceit is perverted into a means of perpetuating them and multiplying their evil consequences. It has been the just pride of our jurisprudence that neither law nor equity will give countenance to fraud and that, no matter how novel or ingenious its scheme, the courts will interfere to prevent its consummation and to redress the injury resulting therefrom to innocent persons. To hold that

a registry once secured by fraud is irrevocable would be to destroy the value of the record as a means of maintaining and evidencing the purity of the blood and breeding of the animals entered therein, and the purchaser or breeder consulting such record would have no assurance that a pedigree there found is not a bald invention. It is therefore in the interest of sound public policy as well as of private right that when a fraudulent entry is discovered, the association shall be empowered to vacate or set it aside. It is not here necessary to prescribe any exclusive method by which such vacation is to be accomplished. It is enough to say that in our judgment it is a situation of which a court of equity will take cognizance; and having before it all parties in interest, and the fraud being clearly established, it will order the cancellation of such registry, imposing such terms, if any, as equity and good conscience may require. None of the precedents cited by the plaintiffs go to the extent claimed by counsel. The general doctrine of estoppel by deed and by conduct is too well established to admit of question, and as we have already said, conditions may be supposed under which the defendant association would be held estopped to deny the truth or correctness of the certificate. But the circumstances here are out of the ordinary. A certificate of registry in a herd book of recognized authority is a proclamation to the world. It is intended to be passed to each successive purchaser of the registered animal, giving to it a character, reputation and substantial value which it would not have except for its admission to registry. So long as it remains uncanceled, the association which issued it stands in the position of saying to every buyer, "This is the pedigree and breeding of the animal here described." If, then, when the association discovers that the entry was fraudulently obtained, it is held estopped to deny or cancel it because of the resulting injury to the present owner, it is placed in the position of one who is compelled by law to certify to the truth of a known falsehood as often as the animal so registered changes owners. Such a ruling would,

in our opinion, be contrary to all sound principle, and we are disposed to hold that the court below was right in ordering the cancellation of the entry and certificate. This is not to say that the plaintiffs are without remedy, but rather that it is well within the power of a court of equity to devise a remedy by which substantial redress may be had without perpetuating the fraud by which they have been injured.

So far as the plaintiffs' appeal relates to their claims for damages on account of the exclusion from registry of the colts produced by the mares Flora and Maud, it will be considered in a later paragraph of this opinion.

II. The defendant's appeal turns upon the question whether the court was authorized to assess damages in favor of the plaintiffs. The point is made that the issues as presented by the pleadings are not broad enough

2. EQUITY :
jurisdiction
retained for
full settlement
of contro-
versy. to permit such recovery. The objection cannot be sustained. The plaintiffs did seek specifically for relief by way of injunction but further prayed generally for such other and further relief as the court might find just and equitable in the premises. The defendants traversed plaintiff's allegations of fact and pleaded affirmatively other facts on which they asked specific relief against the plaintiff and also for general relief. We have already held that the case thus made by the pleadings is properly cognizable in equity, and it is a thoroughly well settled proposition that when equity has once acquired jurisdiction of a controversy, it will retain it for complete settlement and adjudication of all questions material or necessary to accomplish complete justice between the parties and make further litigation over the same subject-matter unnecessary. *Reiger v. Turley*, 151 Iowa 491; *Fisher v. Trumbauer*, 160 Iowa 255; *Thomas v. Farley*, 76 Iowa 735; *Mudge v. Livermore*, 148 Iowa 472.

The case at bar is clearly within the rule, so far at least as the question of pleading is concerned.

Turning to the merits of the case, it is argued for the

appellants that there is no contract relation between the association and plaintiffs, and that, if the registration and certi-

3. ESTOPPEL : fication of the animals does involve any con-
representations tract obligation on the part of the association,
not known to it was to the person who applied for such reg-
be true, made istry and to no other person, and has been
as of knowl- edge : reliance
thereon :
damage.

fully performed. So too, counsel say, plain-

tiffs cannot recover upon any theory of tort because the association had no dealings with them, made no representations to them or for their benefit, and was charged with no duty to the purchasers of the registered animals for violation or neglect of which plaintiffs can demand compensation. This argument is expressly grounded upon the theory that the association by its certificate in this case makes no statement or representation of fact except that the animal there named had been registered upon the application of DeClow. The pedigree which it sets forth, counsel insist, is not a statement or representation by the association, but is merely a statement of what DeClow's application contains, for the correctness of which the association assumes no responsibility whatever. If this be true, and the matter of registration and certification of pedigree is nothing more than a method of recording and reporting the claims made by owners for the breeding of their horses, and the association assumes no responsibility for the truth of such claims concerning horses which it admits to registry, then the whole business is but idle child's play and the avowed purpose of promoting the pure breeding of such animals is wholly lost sight of. But we think appellant will be slow to accept the logical conclusion of its own argument and admit that its only function is the merely passive one of recording the claims asserted by horse owners, or that buyers of horses which it has admitted to registry may not rightly or safely rely upon its certificate of pedigree. Indeed, its attitude in this case is a practical declaration that such is not its interpretation of its own functions or obligations and that it has a duty to perform, not merely to those who present

horses for registry, but also to the public, and especially to those who look to it and rely upon its records for authentic evidence of the blood and breeding of horses. Otherwise, it has no standing in this case to demand the cancellation of the registry of the horses in controversy. Nor is the certificate in its terms capable of the narrow construction which counsel seek to put upon it. True, it recites that the registry has been made upon the application of DeClow, but it nowhere and in no manner says or implies that the pedigree which follows is a mere recitation of the claims stated in such application. On the contrary, the fair and reasonable implication is that the association has found the claim of DeClow to be true and that the animal named is of the pedigree therein set out. That the association did not feel bound by the application and that it undertook, in part at least, to certify to the pedigree from its own knowledge and investigation is clearly indicated by the fact that the breeding of the mare in each case as given by the certificate varies in several items from that given in the application, in that the registry numbers of the sire and of the first dam and second dam differ entirely from the corresponding numbers given by the applicant. The chief, if not the only, purpose of issuing such a certificate and placing it in the hands of a horse owner is to enable him to exhibit it to buyers and others who may be interested as proofs of the breeding of the animal and thereby enhance its desirability and value. It must be expected that it will be relied upon by purchasers and will pass from hand to hand with each change of ownership. It is a material representation affecting the value of the horse, and until withdrawn or cancelled for sufficient cause, it remains a continuing present representation addressed to all persons who may desire to purchase. It is an elementary proposition that if one person induces another to part with his money or property by knowingly false representations or by representations made as of his own knowledge, which he does not know to be true, he is liable in damages to him who is thus misled to his injury.

The remedy is sometimes found in an ordinary action at law for recovery of damages and again is worked out in equity by an application of the law of estoppel which denies to the party making the representations the right to show there was no intent to defraud where the party to whom they were made has acted upon them. *Bispham's Equity* (6th Ed.) Sec. 282 to 288; *Smith v. Cramer*, 39 Iowa 413, 416; *Kirchman v. Coal Co.*, 112 Iowa 668, 675; *Day v. Lown*, 51 Iowa 364, 368.

For the purposes of this case, if it was within the authority of the court below, while granting the defendants the affirmative relief which they demanded, to require them also to do equity by compensating plaintiffs for the injury suffered by them, it will not be necessary for us to discuss or determine what right, if any, plaintiff may have had to recover at law. That the court did have such authority upon the showing made is not open to serious doubt. Of the rule which holds a party to responsibility for his representations, notwithstanding his good faith, where another has acted upon them, there are familiar examples in the books and its application and enforcement are of frequent occurrence in judicial proceedings. For example, suppose A, desiring to give B credit and standing among business men, gives him a letter addressed to "To whom it may concern," certifying him to be a man of large wealth and perfectly good for all debts he may contract, and thereafter, finding that the letter has been delivered to a bank which claims to have given B credit upon the strength of it, he brings suit to enjoin further use of the writing and for its cancellation and surrender to him. It scarcely needs argument to sustain the proposition that if the bank has in good faith given B credit relying upon the letter, the fact that A was grossly imposed upon and deceived as to B's financial condition will not entitle him to a cancellation or surrender of the letter except on condition that he pay or satisfy the bank's claim. And this would be emphatically true if the certification of B's financial responsibility had been given for a valuable consideration and not as a mere

courtesy. The hypothetical case is not, of course, identical in its facts with the one at bar, yet in principle they are not widely different. The defendant association for a money consideration certified the horses as having the pedigree and breeding therein described. Such certification gave and must have been intended to give the animals a greater value and readier market than they would have had without such authentic attestation of their blood and breeding. Having thus promoted the sale of the horses to plaintiffs at a price materially greater than their value as animals ineligible to registry, it is clearly equitable that, as a condition of cancelling the registration and annulling the certificate which it had issued, the association shall make good the loss resulting to the plaintiffs, and the decree requiring such reparation must, therefore, be approved.

It may also be added that in undertaking to serve the public in general and horse owners in particular by establishing and maintaining a registry of breeding, for which service a compensation was exacted, the association was at least bound to conduct the business with reasonable care to make the records speak the truth, and this duty it owed not alone to the owners presenting horses for registry, but to every person who might reasonably be expected to rely thereon or be influenced thereby in dealing with reference to such property. Failure in such duty would be actionable negligence and there is sufficient evidence in this case to justify a finding that in registering and certifying the breeding of the mares Flora and Maud, due care was not exercised.

III. The trial court assessed damages in favor of plaintiffs as of the date of their purchases for the difference between the market values of the mares Flora and Maud as

grade animals not entitled to registry and the market value they would have had if possessed of the blood and breeding shown by the certificates of the defendant association, but no damages were allowed for the loss so sustained in the value of the colts produced by these mares after

4. DAMAGES :
remoteness :
infinity of
causes :
animals : fab-
ricated pedi-
gree : foals.

their purchase. From this ruling with respect to the colts, plaintiffs appeal. It is their theory that the depreciation or loss in the value of the colts because of the cancellation of the registry of the dams is the direct and proximate result of the same act which occasioned the loss for which a recovery was allowed by the court, and that the same rule or principle which will uphold the assessment of damages in the one instance requires a like holding in the other. But the position thus taken is untenable. The thing which plaintiffs claim and prove they were induced to do by the act of the association was the purchase of the mares Flora and Maud in reliance upon their alleged breeding and pedigree. The colts here in question were not then in existence. Whether the mares would ever produce colts was then a mere possibility, concerning which the certificate of the association contained no representation or assurance. It may be that the plaintiffs bought the mares with the intent to utilize them as breeders of pure bred French Draft horses. If so, the assumed usefulness of the animals for that purpose was doubtless one of the principal elements which gave them increased value over the price they would have commanded as ordinary grade mares. This increased value, which plaintiffs, as witnesses, estimate at \$300 for each animal, represents or includes what they were worth as breeders of pure bred colts in excess of their value as breeders of grade stock, and such sum necessarily represents or includes the immediate or proximate loss or damage which the purchasers sustained in being induced to buy mares of an inferior breeding upon representations that they were of a pedigree entitling them to registry. When, therefore, the trial court awarded damages to the full amount of the difference between these values, it provided compensation to plaintiffs for all the loss to which they had been directly or proximately subjected by the misrepresentation of which they complain. The fact that colts not then in being and thereafter produced proved to be of less value than they would have been if eligible to registry is too incidental and remote to justify an assessment of

additional damages. Stated in other terms, plaintiffs, according to their counsel, were purchasing brood mares. They were not purchasing colts which might be produced in the future, but brood animals, in which the possibility of reproduction was an element of value affecting the price asked and paid. If plaintiffs were injured in the legal sense of the word, it was in being thus induced to pay more than the property was worth, and their injury is to be redressed by allowing them to recover on that basis.

The principle here applied as to the measure of the recoverable damage is not altogether unlike that applied by this court in *Crawford v. Williams*, 48 Iowa 247, where suit was brought by the owner of a registered heifer against the owner of an unregistered bull which was unlawfully allowed to run at large and come in contact with the heifer. The plaintiff was there allowed to recover, not the difference between the inferior calf produced and the value which it would have had if eligible to registry, but the difference in the value of the heifer as a breeder of fine stock before meeting the unregistered bull and its value immediately thereafter. In other words, there, as here, the damage, if any, is such as affects or has reference to the value of the animal about which the controversy has arisen, and not to its future or possible progeny. The cases cited for plaintiff, where one selling a diseased animal has been held in damages not only for loss in its value but also for the infection of other animals belonging to the purchaser, and where a vendee of property with a warranty may on rescission for breach thereof recover cost of keeping the property before the breach was discovered, and other precedents of kindred character have no controlling application here. In all such cases, that for which additional damages have been allowed is the direct or immediate result or consequence of the original wrong or default complained of, a condition which does not here appear. The remoteness of the alleged damages in this respect is evident upon a little reflection. If plaintiffs are entitled to recover damages with ref-

erence to colts produced by these mares since the purchase and before the trial below, why may they not continue to breed the mares every year during the period of their productive existence and each year have a new cause of action against the association? If so, then why may they not repeat the process with each succeeding generation of horses whose lineage may be traced back to Flora and Maud? There is but one place to stop, and that is with the animals which were given a fabricated pedigree whereby plaintiffs were induced to purchase them at a price beyond their value. That excess is the measure of their loss and of their right to recover. If a farmer purchases a reaper which is warranted or is represented to be suitable for the harvest of his grain and it proves to be defective, his recovery of damages is ordinarily limited to the difference between the machine had it been as warranted and its value with the defect of which complaint is made. The fact that, by reason of the failure of the machine to work as represented, the purchaser's grain has been lost or that he has thereby been put to expense in the purchase of other machines or in the employment of additional help affords no ground for the assessment of damages. The loss so sustained may be traced to the failure of the machine to fill the warranty of the seller, but it is universally regarded as too remote to sustain a recovery against the warrantor. The damages which plaintiffs here claim are not less remote than those suggested in the foregoing illustration.

It follows from what we have said that the conclusions announced by the trial court are correct and its decree will upon both appeals be—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

JOSEPH CVITANOVICH, Appellee, v. DAVID BROMBERG, Appellant.

EVIDENCE: Opinions—Liquors Sold—Amount—Estimate. Under

- 1 record, *held* not objectionable to permit a witness, who kept no account of sales of liquors, to state "about" how much of such liquors were delivered at divers times.

TRIAL: Cross-Examination—Undue Limitation. Where the witness

- 2 claimed he was working all the time for a certain brewing company in the delivery of liquors to plaintiff for defendant and was indefinite in his statements as to the amount delivered, *held*, the defendant should have been permitted, on cross-examination, to show that during said time the witness was dealing with other liquor houses and delivering their liquors to plaintiff. But *held* not reversible error to refuse such right.

INTOXICATING LIQUORS: Evidence—Federal Liquor Tax Receipt

- 3 —**Presumption.** The possession of a Federal intoxicating liquor tax receipt raises a presumption that the holder is engaged in the unlawful sale of intoxicating liquors, whether the action at bar be civil or criminal. (Sec. 2427, Code 1897.) But the holder has the right to explain his possession of such receipt and thereby nullify the statutory presumption.

TRIAL: Evidence—Argument—Wealth of Litigants. The law has

- 4 but one standard for rich and poor alike—"a fair trial." The injection into a trial of the relative wealth of the litigants, either by direct questions or insinuations in argument before the jury, is offensive to the high ideals of the law. Not even the curative qualities of a rebuke by the court will always remove the reversible character of such conduct.

PRINCIPLE APPLIED: Plaintiff brought action to recover for liquors illegally sold by defendant to plaintiff. The record on appeal was confusing, the evidence doubtful, and some of the questions close. Defendant was asked by plaintiff if he had not become rich by selling intoxicating liquors, objection thereto was overruled, and defendant answered, "I make good money in real estate, not in whisky, that comes on the side." This was followed by questions designed to show the defendant's relative earnings from the real estate business and from selling

whisky and beer. Objections thereto were sustained. In argument, plaintiff's counsel said: "I say that Bromberg got rich collecting money on beer and whisky which he sold to people of this county." Objection being made, the court said: "It does not make any difference whether Mr. Bromberg is rich or not. It has nothing to do with the case." *Held*, the conduct of counsel was reversible error, notwithstanding the rebuke by the court.

Appeal from Appanoose District Court.—HON. C. W. VERMILION, Judge.

THURSDAY, APRIL 8, 1915.

ACTION brought by plaintiff to recover \$2,700.00 for liquor alleged by him to have been sold to him by the defendant between June, 1908, and November, 1910. The action was brought under the provisions of Sec. 2423 of the Code. There was a trial to a jury and a verdict and judgment against defendant for \$1,500.00, from which he appeals.—*Reversed*.

Wilson & Smith, for appellant.

C. A. Baker, for appellee.

PRESTON, J.—1. We have had some difficulty in determining the merits of the controversy because of the confusion in the record. Twenty-four witnesses were examined, but their names appear sixty-seven times in the abstract and two additional abstracts. Substantially all the witnesses on both sides were recalled on the trial, some of them as many as four or five times. Their evidence is abstracted in the same way and set out in different places in the abstract, and again in the same manner in the additional abstracts. Some of the corrections of the testimony in the additional abstracts do not refer to the page where the testimony is set out in the abstract, or the first additional abstract. It might be well, perhaps, for trial judges, when counsel on both sides get into the habit of only partly examining their witnesses and excusing them, and then recalling all, or substantially all, of them,

to suggest to the attorneys that they exhaust the testimony of the witness before excusing him, subject, of course, to the right to recall a witness if something has been really overlooked. We have been compelled to abstract the abstracts and spend some time in straightening out the record that we could have very well used in investigating the points presented.

2. Appellant argues that the plaintiff is a self-confessed bootlegger and that his client, the defendant, claims that this case is a plain and simple holdup; that plaintiff was convicted of selling liquor and went to jail, and, because defendant would not pay his fine of three hundred dollars, this suit was brought; and that there was a conspiracy between plaintiff and one Herschberg, who was angry at defendant, and that the case rests largely upon the testimony of Herschberg, who, as defendant alleges, was discredited and impeached; that but for the prejudice against a person in the liquor business, there would have been no verdict.

Appellee admits in argument that plaintiff was convicted of selling intoxicating liquor, as he says, because defendant had induced him to sell, and promised plaintiff that he would protect him and that plaintiff would not have to go to jail; and that then defendant refused to pay appellee's fine and protect him, as he had promised; but, though witnesses gave impeaching testimony against Herschberg, and we are assured by counsel for appellee that plaintiff is a Croatian, speaking no English, and was induced by the defendant to purchase intoxicating liquors from him (defendant) and sell the same at his residence, where plaintiff's wife kept boarders, all foreign-speaking people, and that thus he became a "self-confessed bootlegger," from the record we are convinced that the transactions are not creditable to either plaintiff or defendant, and that neither is as innocent as he pretends. They were both selling liquor contrary to law.

3. The third assignment of error is that the court erred in permitting the witness Herschberg to express an opinion

as to the amount of beer and whisky delivered to plaintiff during the time in controversy, for that his answer was simply a guess or speculation. It must be admitted that the evidence is somewhat indefinite, but it is not altogether the expression of an opinion, as contended by appellant, but the statement of facts. The claim is that this witness, under instructions from defendant, delivered beer and whisky to the plaintiff. Witness testifies that he kept no account of the sales or the quantity of liquor sold, but that he turned in to defendant the amount each night. His estimate is that he delivered about so many cases of each, beer and whisky, to defendant and that plaintiff paid the defendant during the time in question a certain amount on each coal mine pay day. Under the circumstances, it would be difficult to get at it in any other way. But we are of opinion that it was a question for the jury from all the evidence in the case. It was also a question for the jury, under the instructions of the court, of which no complaint is made, as to whether the sales were made in Iowa.

4. Complaint is made because Exhibit "P-3" was admitted in evidence. This purports to be an account between plaintiff and the Rochester Brewery, and the wife of plaintiff testifies that the defendant gave it to her.

5. Herschberg testified that he was working all the time for the Rochester Brewing Company, and defendant assigns

2. TRIAL: cross-examination: undue limitation. as error that the court limited the cross-examination of this witness as to handling of liquors for other concerns during the time it is alleged Herschberg was delivering liquor for defendant. The record is:

Q. "What other breweries were you acting for in 1909 and 1910, if any?"

Objected to as assuming, immaterial, not proper cross-examination. The objection was sustained, but witness seems to have answered. The abstract shows:

A. "I was working all the time for the Rochester Brewing Company."

Q. "Don't you know that you handled Simon Lewis whisky at Rock Island?"

Objected to as incompetent, not proper cross-examination, immaterial. Sustained.

Q. "Don't you know that you delivered the Simon Lewis liquor to Joe Cvitanovich during the time you have said you were working for the Rochester Brewing Company?"

Objected to as not proper cross-examination. Sustained.

We think the court might well have permitted a more liberal cross-examination of the witness, under the circumstances. As before stated, the evidence of the witness was somewhat indefinite as to the amount of liquor sold, and we think if, during the time witness claims he was working for one concern and delivering liquor to plaintiff for defendant, he was selling liquor to plaintiff from other houses, it would have a bearing on the question of amount of liquor sold by defendant. We would not reverse for this alone, although we think defendant was entitled to a cross-examination of the witness on that subject. But witness Simon Lewis testified as a witness for defendant, without objection, that he was in the liquor business at Rock Island, and that Herschberg was working for him in 1909, and that he was collecting for liquor sold in the territory where plaintiff was selling; this witness also testified that he shipped liquor to a man named Joseph Cvitanovich from June, 1908, to November, 1910. We think defendant was entitled to cross-examine the witness on the subject, notwithstanding the evidence of Lewis.

6. Appellant complains that the court erred in admitting

8. INTOXICATING
LIQUORS: evi- testimony as to possession by defendant of a
dence: federal government stamp. Appellant cites no cases,
liquor tax re- but contends that the statute does not apply
ceipt: pre- to a civil proceeding for the recovery of the
sumption. purchase price of liquor, but only to criminal proceedings

under the chapter relative to selling or keeping for sale of intoxicating liquors. Sec. 2427 provides, in part:

“In all actions, prosecutions and proceedings under the provisions of this chapter, proof of the actual manufacture, sale or gift in evasion of the statute of intoxicating liquors by a person not authorized to manufacture, sell or give the same shall be presumptive evidence of illegal manufacture or sale, etc. . . . The fact that any person not authorized to keep for sale and to sell intoxicating liquors for lawful purposes, engaged in any kind of business, has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquors, or shall have paid such special tax for the sale of such liquors in this state, shall be presumptive evidence that the person owning or controlling such receipt or stamp, or having paid such special tax, is engaged in keeping for sale or selling intoxicating liquors contrary to the provisions of this chapter.”

The trial court instructed in accordance with this provision of the statute. This action, as before stated, was brought under Sec. 2423 of the Code, which is in the same chapter as the section quoted, and we think it applies here.

7. But it is said by appellant that the court erred in refusing to permit defendant's explanation of his possession of a government stamp or license. The statute quoted makes the possession of the government stamp, or payment of the tax, presumptive, and not conclusive, evidence. We think a party is entitled to explain in regard to this. In *Jones v. Welch*, 167 Iowa 443, the holder of the stamp was permitted to give his explanation, but it was not determined that he had a right to do so. Under the record in this case, it is doubtful whether appellant is in a position to complain. Defendant testified that he never sold any liquor at all, and then this question was asked:

Q. "And, by the way, was it your understanding that the Government required that a collection agent have a Government license?"

Plaintiff objects as immaterial. The objection sustained.

This is all the record shows on this subject. There was no offer to prove that such was the understanding of the witness. Possibly we should infer that the witness would have answered "yes," but he could have answered the question by either "yes" or "no." If the answer to the question should be "no," then, of course, it would not be an explanation at all.

8. The next two assignments of error may be considered together. They are: First, that the court erred in overruling defendant's objections to questions as to defendant's becoming

4. TRIAL: evidence: argument: wealth of litigants. ing rich by the taking of orders for beer and whisky; and second, that counsel for plaintiff was guilty of prejudicial misconduct in argument to the jury in referring to the same matter. The learned trial court seems to have tried the case carefully and, doubtless, in the hurry of the trial, overlooked the record as it is in regard to this matter. We think these two exceptions must be sustained. We had always supposed that litigants were entitled to a trial of their cases on the merits, regardless of the question as to whether they are rich or poor. The record shows that, when defendant was on the stand, counsel for plaintiff, in cross-examination, asked:

Q. "The facts are, Mr. Bromberg, that you have grown rich from taking orders for beer and whisky in this county, haven't you? (Defendant objects as prejudicial, improper and misconduct. Overruled.) A. I make good money in the real estate. Not in the whisky. That comes on the side. Q. Oh, whisky is on the side? A. Yes, sir. Q. How much money did you make in the year 1909 in real estate? (Objected to as immaterial, and sustained.) Q. How much money did you make in 1909 selling beer and whisky? (Objected to as assuming and immaterial. Sustained.)"

In the argument to the jury, counsel for plaintiff said:

"I say that Bromberg got rich collecting money on beer and whisky which he sold to people in Appanoose County, Iowa. (Defendant objects to the statement as improper, prejudicial, etc.) Court: It doesn't make any difference whether Mr. Bromberg is rich or not; it has nothing to do with the case. Counsel for Defendant: We except to the remark of counsel for the reason stated."

It should be said that, before witness had completed his answer, and after he had said, "I make good money in the real estate," counsel for plaintiff moved to strike the answer as not responsive, which was overruled, and the witness continued with the rest of that answer without any further question being asked.

Counsel for appellee state in argument here that the question was asked for the purpose of having witness admit that he had taken orders for beer and whisky and was selling it, and was so considered by the trial judge, and that the statement by the trial court that it doesn't make any difference whether Bromberg is rich or not cures the error, if any there was. But we are of opinion that this is not sufficient. If counsel for plaintiff had only referred in his argument to the financial condition of defendant, and the court had promptly made the statement it did, and this had been all there was to it, it is possible that the error should be considered as cured, although there are cases holding that even then a case should be reversed for such a remark.

In *Westerkamp v. Brooks*, 115 Iowa 159, an objectionable remark was made by one of the attorneys in the opening argument, and, upon objection being made, the court stated that he would instruct the jury not to consider any statements outside the record, and the court did so instruct in one of its written instructions, and co-counsel in the closing argument withdrew the remarks complained of and requested the jury not to consider any matter outside the record. Under such

circumstances, it was held that there was no prejudice, and there are other cases to substantially the same effect. But in this case, the evidence was in the record that defendant had made money in real estate, and this was in answer to a question as to whether he had not grown rich from taking orders for beer and whisky. In addition to that, the matter was emphasized by two other questions, objections to which were sustained. We are of opinion that there was reversible error at this point. As bearing upon this question, see: *Sullivan v. Railway*, 119 Iowa 464; *Manufacturing Co. v. Sterrett*, 94 Iowa 158; *Henry v. Sioux City Ry.*, 70 Iowa 233; *Almon v. Railway*, 163 Iowa 449.

In the instant case, as before stated, there was not only the statement of counsel in argument to the jury that defendant was rich, but there was evidence in the record as to his having made money, and insinuations in other questions, some of which were answered and some not answered. We have already indicated that the evidence is somewhat doubtful at some points, and there are other close questions in the case, and, on the whole record, we think it ought not to be said that the record as heretofore set out in regard to the wealth of the defendant was not prejudicial.

It is thought sometimes that in some of the cases a reversal has been had in civil actions for less serious misconduct than misconduct in some of the criminal cases where the conviction was affirmed. It would appear, perhaps, that the rule ought to be the other way, and yet a possible explanation of this is that, as is well known, in criminal cases counsel for defendant go outside the record in order to secure an acquittal, knowing that a new trial may not be granted under such circumstances, and that counsel for the state have a right to reply to such improper statements, and that, as long as the argument for the state is confined to a reply to improper argument by counsel for defendant, a reversal will not be had. If the state has no right to reply to such argument, then an acquittal might be obtained in a great many cases on matters

entirely outside the record, if the trial court does not control the trial. In civil cases, however, a new trial may be granted either party for prejudicial misconduct.

Some other matters have been argued, but we do not regard them as of controlling importance. Appellant's motion to strike the additional abstract is overruled.

For the errors pointed out, the judgment is—*Reversed*, and the cause—*Remanded* for another trial.

DEEMER, C. J., EVANS and LADD, JJ., concur.

CHARLES J. FALLERS, Appellee, v. S. S. HUMMEL, Appellant.

BOUNDARIES: Acquiescence—Sufficiency of Evidence—Fact Ques-

- 1 tion. Evidence reviewed and held sufficient to show that a certain line, *though with a jog therein*, had been acquiesced in as a boundary line for more than ten years.

ACTION: Wrong Calendar—Failure of Defendant to Object—Waiver.

- 2 Improperly bringing an action in equity instead of at law is no ground for dismissal. If defendant does not like his location on the calendar he must say so, not after trial but before answer, by appropriate motion to transfer. Failing in this he waives any error in bringing the action on the wrong calendar. Pre-eminently is this true when defendant, instead of moving for a transfer, countered in his answer by a prayer for equitable relief for himself. (Sec. 3434, Code 1897.)

EQUITY: Jurisdiction Once Attaching, Retained for Full Settlement

- 3 of Controversy. Equity, having obtained jurisdiction of a controversy, will retain it and do full justice, even though in so doing it may pass on matters ordinarily cognizable at law.

INJUNCTION: Waste—Proper Action. An action in equity for in-

- 4 junction is a proper action to prevent the cutting down of trees, removing fences and destroying fixtures.

Appeal from Fremont District Court.—HON. E. B. WOODRUFF, Judge.

THURSDAY, APRIL 8, 1915.

THIS is an action in equity to establish a disputed division line and to quiet title to a strip of land in controversy based upon adverse possession and acquiescence. The controversy is over a division fence. Plaintiff alleges that he and defendant and their grantors have acquiesced in the line upon which is located a hedge and post and board fence as the true line for nearly forty years; that defendant has threatened to change the location of a part of the fence, which would appropriate a part of plaintiff's land and injure plaintiff's water reservoir built to the present line and his water system; that this would injure and destroy his trees, garden, stockyards and lot. Plaintiff asked an injunction in addition to the other equitable relief prayed. There was a trial to the court and a decree for plaintiff as prayed. Defendant appeals.—*Affirmed.*

V. V. McIntosh and T. S. Stevens, for appellant.

William Eaton and Jennings & Mattox, for appellee.

PRESTON, J.—There seems to be no controversy between counsel as to the law, both claiming that the case is ruled by *Miller v. Mills Co.*, 111 Iowa 654, and the question of fact

1. BOUNDARIES : acquiescence : sufficiency of evidence : fact question.	is whether there has been such acquiescence as that the fence in question should be treated as the true line. Plaintiff owns the east half of the southwest quarter of the section, and
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defendant is the owner of the west half of the same quarter section. There is a jog in the fence about sixty rods from the south line. The plaintiff bought his land in 1895, and the defendant purchased his in 1901. The suit was brought in 1913. The fence has been located in the same place for many years, with the jog as at present. Part of the way the fence is board and posts, some wire; but for about twenty rods in the south part the fence is hedge trees, some of them six inches

in diameter at the base and varying from sixteen to eighteen feet in height, the others from two to four inches in diameter. The testimony tends to show that the hedge is thick and will turn stock. Witnesses testify that there is evidence at the north end of the hedge fence of its having at some time run through to the north end. About 1875, the hedge fence was growing on the present line. A plat was introduced in evidence, from which it appears that a river, or run, from the northwest to the southeast, crosses the division fence at about the place of the jog. We are unable to make out from the plat whether it is a river or a run; the writing is blurred. Plaintiff's house and yards are east and south of the jog in the fence.

The defendant's claim is that the line of the fence south of the jog is too far west and on defendant's land. Plaintiff has built a water reservoir south of the jog, the west end of which extends to the fence as it now stands. The water reservoir is connected by pipes with plaintiff's barn and stock-yards. The reservoir is at the highest point; it is twelve feet deep and eight feet wide. An orchard of apple and plum trees was set out by plaintiff in 1895 between his house and the hedge. Some of the trees are on the disputed line.

The undisputed evidence is that the fence has been located as it is now for about thirty-eight years. The land on either side has been farmed by the parties to this suit and their grantors up to the fence. A part of the time, on one side, it was pastured. Many of the facts are undisputed.

A significant fact, and we think a strong circumstance against the contention of defendant, is that there was an agreement between plaintiff, after he bought the land, and the defendant's grantor that plaintiff should keep up the north half of the fence and the other party the south half. Since defendant bought his land, in 1901, he has maintained and kept in repair the south half of the fence, and in this half is the jog.

Plaintiff testifies that the hedge fence in the south half

has been trimmed once or twice by defendant; that he saw the land before he purchased of Pease, and that he saw the division fence and believed it was the division line; that he farmed to the fence and put on the improvements in good faith, believing the fence was the division line; that the fence is now just as it was when he bought the land.

Mr. Pease, plaintiff's grantor, owned the land two years; says that he and the party owning the Hummel tract farmed up to the fence during all the time he owned the land; that the division fence was there then as now; the hedge was ten to twelve feet high; that he didn't know whether the line was the correct line or not.

Another witness, Scott, testifies that he has known the Fallers and Hummel land thirty-seven years, and thinks the land was farmed up to the hedge ever since he knew it.

Another witness, Biggs, testifies that he has known the land for twenty years; that the land has been farmed up to the hedge in former years, but Hummel's has been in pasture for the last few years, but that it has been in grain, mostly in corn, up to the hedge. He says the jog in the fence has been there for twenty years or more.

Other witnesses for plaintiff gave similar testimony.

For defendant, witness Forney, a surveyor, says he did not find a government corner in the survey he made, but he made other measurements and located the line between the land of plaintiff and defendant, and that the fence south of the jog is west of the line. This survey was made in 1912. He says, however, that defendant's land is a little wider at the south end than the north end, but is short at both ends.

Mr. Johnson, who owned the Hummel tract in 1888, and for some years thereafter, says that one Gunnison occupied what is now the Fallers land, and that he gave Gunnison permission to move the fence to give the hogs room; that Gunnison was to move it back, but did not do so; this was the part of the fence north of the hedge toward the ditch; and that he and one Boreman talked about the fence, and

Boreman said it was not on the line, and that he talked to plaintiff about it in 1897. A year or such a matter before the suit was brought, there was some controversy between plaintiff and defendant in regard to the matter.

Witness Cass testified that he knew the fence was not on the line and that the fence was not regarded as the line. But this witness is speaking of a time many years prior to the time that plaintiff and defendant bought their lands. He conveyed the Hummel land in 1882. He says, however, that the hedge fence was put in in 1875, and just as it is now.

Witness Pease testified that when he owned the Fallers land one Johnson owned the Hummel land, and that Johnson spoke to him about the fence not being on the line; that he knew the fence was not straight, but says he was not going to change it (the hedge) himself. This witness is testifying to the situation in 1895.

Plaintiff testifies in rebuttal that he had no knowledge of the matters and conversations testified to by Johnson in regard to Gunnison, Boreman and others; that he had no talk with plaintiff or dispute about the line at any of the times referred to by defendant. Counsel for defendant says that, the jog in the fence being abrupt, no one could be misled into thinking that the fence was the true line; but the jog in the fence was just as apparent to the defendant, who was keeping up this part as his share of the division fence, as to anyone else.

We have not set out all the evidence. But we are satisfied that, even though defendant's contention may be true, there was some controversy between prior owners of the land, and there may not, perhaps, have been acquiescence as to them. But defendant bought his land in 1895, and the only step ever taken by defendant toward actually asserting ownership of the strip lying east of the hedge and its continuance of the jog in the fence was when he started to set posts and string wires thereon in the fore part of 1913. We are satisfied from a reading of the record that there was acquies-

cence for more than ten years before the final controversy between the parties, a short time before the suit was brought. The equities are with the plaintiff, and, under the rule of the cases, there was acquiescence between plaintiff and defendant for more than ten years in the fence as the line between them.

2. Among other things in the answer, the defendant denied that plaintiff is entitled to equitable relief; avers that plaintiff has a speedy and adequate remedy at law; that there is no allegation in the petition or amendment that defendant is insolvent, or that the injury to plaintiff will be irreparable; and prays that plaintiff's petition be dismissed; that he have all proper equitable relief, and judgment for costs.

2. ACTION: wrong calendar: failure of defendant to object: waiver.

The argument on behalf of defendant on this point is that title to real estate cannot be tried by injunction; that the claim of the plaintiff was that he had been in adverse possession of the disputed land; that he had become the owner thereof, while defendant claims that it was a part of his original tract, and denies the adverse possession of plaintiff; that the court undertook to determine in an injunction suit the title to the disputed tract; and that the decree deprived the defendant of his substantial legal rights; and it is urged that because of these matters the cause did not present a matter for equitable jurisdiction.

If it be true, as contended by defendant, that plaintiff improperly brought the action in equity, this would not be a ground for dismissal. The statute, Sec. 3432, provides that an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket. Sec. 3434 provides that the defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provision of the code wrong proceedings have been adopted. And it was held in

Corey v. Sherman, 96 Iowa 114, that the fact that plaintiff has a plain, speedy and adequate remedy at law will not deprive the court of jurisdiction in an equitable action. The remedy in such case is the transfer of the action to the law docket. See also *Fisher v. Trumbauer*, 160 Iowa 255.

The defendant made no motion to transfer to the law docket. We have quoted a part of the answer of defendant, and, as before set out, the defendant in the prayer of his answer asked that "he have all proper and equitable relief." The petition alleged that defendant had threatened to change the location of a part of the fence by removing the same and putting in a new fence east of the present fence; that this could not be done without appropriating the land of the plaintiff and crippling his water system and injuring and destroying trees, garden, stockyards and lot; that defendant, in attempting to carry out said threat, has placed posts and wire upon the ground and commenced work upon the land of plaintiff for the purpose of building a fence, and, unless restrained, will carry out his threat and work irreparable injury to plaintiff; that plaintiff has no adequate remedy at law, and defendant will work a continuing nuisance to plaintiff's property. There was evidence to show that defendant had threatened to do the things alleged. He is now in this court as he was in the district court, claiming the right to do the things he had threatened to do. This is sufficient at this point as showing that such was his purpose. *Bobzin v. Gould, etc.*, 140 Iowa 744.

The action was properly brought in equity to determine the dispute between the parties as to the division line and to settle the dispute as to the strip of land in controversy. The equities were proven. In such a case, equity, having obtained jurisdiction, will determine all questions material or necessary to the accomplishment of full and complete justice between the parties, even though in doing so it may require passing on some matters ordinarily cogniz-

3. EQUITY: jurisdiction once attaching, retained for full settlement of controversy.

able at law. *Fisher v. Trumbauer, supra*, at page 261, and cases.

Aside from this, we think an action in equity for an in-

- 4. INJUNCTION: junction will lie to prevent the defendant cut-
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are of opinion that the decree of the district court was right, and it is—*Affirmed*.

DEEMER, C. J., EVANS and SALINGER, JJ., concur.

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TO

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TO

BOUNDARIES

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TO

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BROKERS.

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Amendment: Validity: Long-continued recognition. The long-continued recognition (30 years) by all departments of the government of the validity of an amendment to the constitution is persuasive as to its validity. *Jones v. McClaughry*, 281.

ENACTMENT OF STATUTES.

Failure of speaker to sign enrolled bill. The final, conclusive, ultimate and only evidence of the passage of a "bill" by both houses of the legislature is the enrolled bill signed by both the president of the Senate and the speaker of the House. *State v. Lynch*, 148.

CONSTITUTIONAL LAW Continued TO CONTRACTS

Holding by indictment or information: Assembly's power to deter-
 6 mine. Sec. 15, Art. 5, Const., when construed with Sec. 11, Art.
 1, Const., has no other effect than to permit the assembly to
 require accused persons to be held to answer for the specified
 higher offenses (a) solely by indictment by grand juries, or (b)
 solely by information without the grand jury, or (c) in part
 by indictment and in part by information. *Jones v. McClaughry*,
 281.

UNIFORM OPERATION OF STATUTES.

General operation of laws: Indictment in term time: Information
 7 in vacation: Difference in procedure. The "uniform operation"
 of general laws commanded by the constitution is furnished by
 every law which operates upon every person within the relations
 and circumstances reasonably provided. Reasonable discrimina-
 tions may be made to meet differences in situation. So held
 under County Attorney Information Act. *Jones v. McClaughry*,
 281.

CONTINUANCE.

Amendment to pleading: Surprise. A continuance on the ground of
 1 surprise was properly denied under the following facts: Plain-
 tiff was seeking to recover damages for injury to his horse.
 Three days before trial plaintiff amended by making another
 party a joint plaintiff, alleging he was part owner of the horse.
 No issue was tendered on the ownership of horse. The new joint
 plaintiff was not present when the collision occurred which in-
 jured the horse. *Menefee v. Whisler*, 19.

CONTRACTS. See WILLS, 1; ADOPTION, 1.

REQUISITES AND VALIDITY.

Lex loci contractus: Lex loci rei citæ: Nebraska real estate com-
 1 mission act. A contract void in the state where made and to
 be performed is void everywhere. *Brown v. Pearson*, 50.

Restraint of marriage. A contract in unreasonable restraint of mar-
 2 riage is against public policy and invalid. *McCoy v. Flynn*, 622.

CONSIDERATION.

Failure of : Issuance of stock shares: Cancellation. Entire failure
 3 of consideration for a contract authorizes an entire cancellation
 of the contract. *Coffin v. Struthers*, 313.

CONTRACTS Continued
CONSTRUCTION.

TO

Costs

Engineering Terms: Flexible meaning: Oral understanding: Practical construction. When an engineering term capable of different meanings (for instance "rock work" in a contract for excavation) is used in a contract, evidence as to the oral understanding at the time the contract was under consideration as to the sense in which the term was used is quite persuasive, especially when a claim based on a counter construction was concealed until the work was done. *Urbana v. District*, 351.

Different Rights: Entirety. A contract granting to second party the right to mine coal under eight different tracts of land at certain royalties, a different time limit being placed on each tract ranging from 3 to 20 years, second party having the option to mine or not to mine with no liability for damages if he did not, but second party agreeing to first mine the coal from under the said land, where the time limit was the least, "at the earliest moment practicable," was held to be an *entirety* and that second party by allowing the time limit to expire as to several tracts without notice of an intention to exercise its option thereby lost its right to exercise any option as to those tracts which had not yet expired by the terms of the writing. *Held* also, second party was not bound under the contract until he gave notice of intention to exercise his option. *Ray v. Ross*, 210.

RESCISSION AND ABANDONMENT.

Intent: Non-User. Abandonment of a contract involves an intent and purpose to surrender the rights acquired. Non-user may not of itself constitute abandonment but if accompanied with other circumstances evincing such an intention, on which the other has acted, an abandonment is effected. *Ray v. Ross*, 210.

PERFORMANCE OR BREACH.

Demanding Benefits: Avoiding Burdens: Vendor and Purchaser.
The burdens of a contract cannot be avoided by one who demands, receives and retains the benefits. *Kretzinger v. Eméring*, 59.

CORROBORATION. See INCEST, 1.

COSTS. See APPEAL AND ERROR, 11.

TAXATION.

Apportionment: Equitableness: Presumption. An apportionment of costs will be presumed just and equitable unless the record on appeal shows the contrary. *Morrow v. Hall*, 534.

COUNTY ATTORNEY INFORMATION ACT TO CRIMINAL LAW
COUNTY ATTORNEY INFORMATION ACT. See CON-
STITUTIONAL LAW, 1-4, 6, 7; INDICTMENT AND INFORMATION,
1, 2.

COURTS.

DURATION OF TERMS.

Terms: When terminated: Ordering recess: Effect on life of
1 **Session.** A term of court continues from the legal convening thereof until (a) the commencement of a new term or (b) adjournment *sine die*. An order declaring the court "in recess until further order" does not terminate the term. A term of court may legally continue in one county even though the judge is holding a term in another county. *Jones v. McClaughry*, 281.

Adjournments without definite date: Practice condemned. The
2 practice of adjourning court without definite date for reconvening, while legal, is strongly disapproved. *Jones v. McClaughry*, 281.

CRIMINAL LAW. See FALSE PRETENSES; HOMICIDE; IN-
GEST; INDICTMENT AND INFORMATION.

TIME FOR PLEA.

Insanity of accused: When criminal proceeding suspended. The
1 court is justified in refusing to suspend criminal proceedings and to empanel a jury to inquire into the sanity of the accused when the insanity of the accused was never in any manner suggested until after the court had opened proceedings to sentence the accused. (Sec. 5540, Code.) *State v. Cooper*, 571.

REQUISITES AND SUFFICIENCY OF INSTRUCTIONS.

Instructions considered as a whole. It is an ancient and threadbare
2 rule that instructions must be construed as a whole. Instructions reviewed and held to be sufficiently connected. *State v. Cooper*, 571.

Requested instruction: Point covered by court. The refusal of a
3 requested instruction followed by the complete covering of the point in the court's instructions leaves no error. *State v. Cooper*, 571.

CRIMINAL LAW Continued

OBJECTIONS TO INSTRUCTIONS.

No objections before reading: Waiver. The court is under no obligation to review instructions as to which no objections were entered prior to the reading thereof to the jury. (Sec. 3705-a Sup. Code, 1913.) *State v. Cooper*, 571.

ARGUMENTS AND CONDUCT OF COUNSEL.

Defendant's failure to testify: Reference to. A direct reference in the course of a trial to defendant's failure to testify is fatal, under Sec. 5484, Code, to the validity of the trial. *State v. Nicola*, 171.

Improper argument: New trial: When granted: Discretion of court. Improper argument, of itself, is not ground for new trial. It is essential that it affirmatively appear that by reason thereof the accused has been deprived of a fair trial. Ordinarily the judgment of the trial court is superior on that question to the judgment of the appellate court. *State v. Cooper*, 571.

Argument outside record: Sustaining objections thereto: Curing error. Sustaining objections to improper argument, and admonition to counsel to keep within the record, with due caution to the jury either orally or generally in the instructions, have large curative effect on such error. *State v. Biewen*, 256.

Argument: Allowable limits: Matters of record. Counsel, even for state, will be permitted to enter upon and pursue such vigorous exercise of his vocabulary as may seem to him meet in the promotion of his client's cause, even though his ventures into the realm of oratory may take the form of strong denunciation, so long as he confines himself to matters of record and reasonable deductions therefrom. *State v. Biewen*, 256.

Improper argument: Objection to: Sufficiency. An objection "to each and every word of said speech" made when the county attorney arose to make his argument, raised no question. *State v. Cooper*, 571.

NEW TRIAL. See Nos. 5-9, above.

JUDGMENT AND SENTENCE.

Oral sentence: Record entry omitted: Effect. A sentence imposed under a plea of guilty and a minute thereof entered on the judge's calendar is wholly without effect as a judgment until actually entered on the record book. *Jones v. McLaughry*, 281.

CRIMINAL LAW Continued TO DAMAGES

Sentence imposed: Failure to enter judgment: Effect: Remand. A

- 11 defendant is not entitled to a discharge from custody because of the failure to enter a judgment against him on his plea of guilty. The limit of his right is to be remanded to the custody of the sheriff of the county to await proper procedure under the information. *Jones v. McClaughry*, 281.

False pretenses: Excessive sentence: Reduction. A sentence, in 11a instant case, to confinement in the penitentiary, reduced on appeal to confinement in the county jail. *State v. Cooper*, 571.

VERDICT.

Form of: Sufficiency. "We the jury, find the defendant (naming 12 him) guilty as charged," the instructions fully setting forth the offense, meets all legal requirements. *State v. Cooper*, 571.

CROSS-EXAMINATION. See WITNESSES.

COVENANTS. See DEEDS.

BUILDING RESTRICTIONS.

Strict enforcement: Substantial performance: Discretion of court.

- 1 He who inserts restrictive building covenants in his deed must bear in mind that, while equity will enjoin a violation in a proper case, (a) the exercise of such power, where strict enforcement is demanded, lies within the sound discretion of the court, (b) the court will look beyond the literal terms of the deed for the real object of the parties, (c) will consider for whose benefit such restrictions were inserted in the deed, (d) will consider whether the original object has been practically or wholly abandoned, and if not, whether a substantial performance will not effectuate the object as well as the proverbial "pound of flesh." *Melson v. Ormsby*, 522.

DAMAGES. See DEATH, 1; TELEGRAPHS AND TELEPHONES, 2, 3.

DIRECT OR REMOTE DAMAGES.

Ex contractu: Ex delicto: Distinction: Contemplated damages:

- 1 Proximate results. 1. Damages *ex contractu* must be (a) proximate and (b) such as were reasonably within the contemplation of the parties, etc. 2. Damages *ex delicto* need only be proximate. Rule No. 2 is not changed by Sec. 2163, Code, in relation

DAMAGES Continued

to liability of telegraph companies for negligence in delivering messages. *Bernstein v. Telegraph Co.*, 115.

Remoteness: Infinity of causes: Animals: Fabricated pedigree:

2 **Foals.** Remote damages cannot be recovered. So held in the case of the foals of a mare purchased under false representations as to her pedigree. *Howard v. Natl. etc. Assoc.*, 719.

Assault and battery: Fright of plaintiff's children. The effect which

3 the fright of children had on their mother, she not being a party to the suit, is inadmissible. *Jolly v. Doolittle*, 658.

AVOIDABLE DAMAGES.

Avoidable consequences: Torts: Telegraphs and telephones: Fail-

4 **ure to deliver message: Damages to health.** The doctrine of "avoidable consequences" has application to actions *ex delicto* as well as *ex contractu*. *Bernstein v. Telegraph Co.*, 115.

Avoidable consequences: Contributory negligence: Distinction. The

5 principles that (1) "plaintiff cannot recover for avoidable consequences," and (2) "plaintiff cannot recover if guilty of contributory negligence," while often producing results closely resembling each other, are yet separate and distinct. The former is a rule of limitation upon plaintiff's recovery; the latter defeats the action itself. *Albrook v. Telegraph Co.*, 412.

MEASURE OF DAMAGES.

Recovery of expenses "paid": Inaccuracy cured by evidence. It is

6 inaccurate, of course, to instruct that one may recover his expenses "incurred," but such inaccuracy is nonprejudicial when the undisputed evidence shows such expenses to be reasonable in amount. *Parkhill v. Storage Co.*, 455.

Personal injuries: Hospital expenses: Reasonable value. One suing

7 for personal injuries may properly show that he paid the amount charged for hospital services, evidence of the reasonable value thereof being later supplied. *Parkhill v. Storage Co.*, 455.

EXCESSIVE DAMAGES.

Excessive verdicts: \$6,000. A verdict for \$8,000 for death, reduced

8 by trial court to \$6,000, is approved, deceased being a farmer, 26 years old, of sound body, industrious, of good habits, earning from \$35 to \$40 per month with board and having saved enough to buy a horse, buggy and town lot. *Hough v. Railroad*, 224.

DAMAGES Continued

TO

DEEDS

Excessive verdicts: \$1,950. Plaintiff when injured was under age, 9 had had several months' experience in the defendant's shops, and was earning \$1.65 per day. The injury caused the amputation of the fourth finger and part of the palm; he was eight days in the hospital and was unable to perform labor for some months. *Held*, verdict for \$1,950 was not excessive. *Cashman v. Powder Co.*, 306.

Death message: Delayed delivery: Excessive verdict: When disturbed. The fact that the jury allowed a greater sum for mental anguish than the appellate court would have allowed is not sufficient to overthrow the verdict. Passion and prejudice must appear. *Albrook v. Telegraph Co.*, 412.

DEATH. See **DAMAGES**, 8.

MEASURE OF DAMAGES.

Present value. "The present value of what one might have saved" 1 is the measure of recovery for death. Instructions in instant case *held* correct. *Hough v. Railroad Co.*, 224.

DEEDS. See **COVENANTS**, 1.

CONSIDERATION.

Support by child: Property exceeding support. An agreement to support 1 port and care for the grantor during his life is a sufficient consideration to support a deed, even though it turns out that the value of the property conveyed largely overpaid for the support of the grantor. *Steen v. Steen*, 264.

VALIDITY.

Parent to child: Consideration inadequate: Prejudice against children: Effect. (a) Prejudice against his or her children, (b) a special fondness for one child over another founded upon a rational conception of his or her relationship to them, (c) the leaving other children unprovided for, or (d) inadequacy of consideration, are not, of themselves, sufficient to overthrow the deed of the parent to a child. *Baker v. Baker*, 473; *Steen v. Steen*, 264.

Undue influence: Mental incapacity: Inference from unjust position. It cannot be inferred that the grantor in a deed was of deficient mental capacity or was the victim of undue influence

DEEDS Continued

simply because the deed deprived some of the children of the interest they otherwise would have taken, the execution of the deed being logical and rational in view of the circumstances. *Hughes v. Silvers*, 366.

Undue influence and mental incapacity: Combination of: Effect. A
4 combination of "mental incapacity" and "undue influence" may be sufficient to overturn the deed of a grantor, when, if either element stood alone in the record, the court could not unhesitatingly pronounce such result. *Baker v. Baker*, 473.

Undue influence: Dying request: Effect. A deed made by a mother
5 in compliance with the dying request of a son furnishes persuasive reason, in the instant case, for sustaining the deed. *Hughes v. Silvers*, 366.

FRAUD, DURESS, UNDUE INFLUENCE.

Who must establish or negative: Parent and child: Confidential re-
6 **lation.** Ordinarily he who alleges must prove. An exception arises (a) where a parent deals to his advantage with a dependent child, and (b) where the child deals to his advantage with a dependent parent. Dependence marks the exception. In the first case the parent and in the latter the child must establish a negative—that he was guilty of no fraud, duress or like poison in taking the conveyance in question. In the zone of non-dependence, the ordinary presumption of good faith prevails. *Hughes v. Silvers*, 366.

Undue influence: Mental incapacity: Father and son: Fiduciary
7 **relation: Burden of proof.** The naked fact that the grantee in a deed is a son of grantor does not throw upon grantee the burden of proof to show there was no undue influence exercised upon grantor in the execution of the deed. The burden of proof to show undue influence clings to him who alleges it until he establishes the confidential and trust relationship. *Steen v. Steen*, 264.

Undue influence: Evidence: Declarations of grantor impeaching
8 **deed: When admissible.** Subsequent declarations, alone, of a grantor, howsoever strong, impeaching the validity of his deed, will not authorize the setting aside of the deed. Such declarations should not be permitted to enter the record *unless* substantive evidence of undue influence or the like is *first* produced. *Hughes v. Silvers*, 366.

DEEDS Continued
CONSTRUCTION.

to

DIVORCE

Grant of fee: Rejection of repugnant clause: When rule inapplicable.

- 9 That the clear grant of a "fee title" demands the rejection of a subsequent repugnant clause is a rule not applicable when the granting clause itself contains a limitation on the fee. *Hess v. Kern*, 646.

DEMURRER. See **LIMITATION OF ACTIONS**, 3.

DE NOVO. See **APPEAL AND ERROR**, 14; **ATTORNEY AND CLIENT**, 4.

DIRECTION OF VERDICT. See **TRIAL**.

DISTRICT COURT. See **COURTS**.

DIVORCE.

GROUND.

Cruelty: Incompatibility of temper. Incompatibility of temper is

- 1 of itself no ground for divorce. Evidence reviewed generally and held not to establish cruel and inhuman treatment. *Meyer v. Meyer*, 204.

Desertion: Living apart by agreement: Severance of relation.

- 2 Where a husband and wife never lived together in the same house, each, by mutual agreement, living separately in the homes of their respective parents, such arrangement created a marital relation capable of being severed by desertion. *Tipton v. Tipton*, 182.

Wilful desertion: Reasonable cause as element. Wilful—intentional

- 3 —desertion is not of itself sufficient to justify a divorce decree. It must be without reasonable excuse. *Tipton v. Tipton*, 182.

DEFENSES.

Reconciliation: Offer after accrual of cause for divorce: Effect. An

- 4 offer of reconciliation by a guilty spouse after the expiration of two full years of desertion without cause does not obliterate his offense and so deprive the innocent spouse of the right to a divorce. *Tipton v. Tipton*, 182.

DIVORCE Continued

TO

DRAINS

Reconciliation refused: When justified. A wife suing for divorce
5 is not precluded from relying on desertion, though she has no affection for her husband and dislikes him and refuses reconciliation, when her state of feeling toward her husband is the result of his own evil conduct. *Tipton v. Tipton*, 182.

Eleventh-hour promise to reform. When one party to the marriage
6 has fully shown a right to a divorce, and demands it, the court has no power to deny such divorce simply because the other party on the trial promises to return to the marital relation. *Tipton v. Tipton*, 182.

MODIFICATION OF DECREE.

Service by publication: Jurisdiction. The court has no power to
7 order a service by publication in an application to modify a decree of divorce. A service by publication unless in strict accord with the statute is a nullity. (Sec. 3534, Sup. Code, 1913.) *Blachly v. Blachly*, 489.

DOWER. See LIMITATION OF ACTIONS, 1.

DRAINS. See FENCES, 1.

ASSESSMENT OF BENEFITS.

Prior drainage system: Adaptability for lateral tiling. In determin-
1 ing the assessment of benefits for a drainage improvement, due consideration should be given (a) to the system of drainage already provided by the landowner, (b) the relative amount of land actually drained by the new improvement, and (c) the extent the improvement affords outlet for lateral drainage. *Harri- man v. Board*, 324; *Obe v. Board*, 449.

Methods pursued: Statute. Invalidity of an assessment of benefits
2 cannot be predicated on the fact that the appraisers first classified the land as "dry," "low," "wet," and "swampy" in order to more intelligently mark the lands upon a scale of 100 as provided by Sec. 1989-a12, Sup. Code, 1913. *Obe v. Board*, 449.

Branches to main drain: Validity. Invalidity of an assessment of
3 benefits cannot be predicated on the fact that one assessment covered both the main drain and branches. *Obe v. Board*, 449.

Excessiveness. Approximate accuracy is all that can be hoped for
4 in an assessment of benefits. Evidence reviewed and held to show that assessment in instant case was not excessive. *Obe v. Board*, 449.

DURESS

TO

ESTOPPEL

DURESS. See DEEDS, 6.**EASEMENTS.** See FENCES, 1.**ELECTIONS.** See SCHOOLS AND SCHOOL DISTRICTS, 1; TAXATION.**SPECIAL ELECTIONS—FORM OF BALLOT.****Special propositions: Submission of: Form of ballot: Duality.**

- 1 Two distinct "objects" must not be so intermingled in a proposition submitted at an election that the voter is unable to freely express his choice on one without referring to the other. The proposition must be confined to one general related scheme. But the "object" is of the essence of the proposition. There is no duality unless the proposition involves purposes which cannot naturally and reasonably be said to be a part of one general plan or scheme. *Mitchell v. Ry. Co.*, 237.

SEPARATE BALLOT BOXES.**When not necessary: Schools and school districts. The violation of**

- 2 a law requiring separate ballot boxes, in certain contingencies, does not necessarily render the election void. *State v. Booth*, 143.

ENROLLED BILL. See CONSTITUTIONAL LAW, 5.**EQUITY.** See ACTION.**RETENTION OF JURISDICTION.****Jurisdiction retained for full settlement of controversy. Equity,**

- 1 having obtained jurisdiction of a controversy, will retain it under a general prayer for equitable relief and do full justice and end the litigation, if possible, even though in so doing it may pass on matters ordinarily cognizable at law. *Howard v. Natl. etc. Assoc.*, 719; *Fallers v. Hummel*, 745.

ERROR. See APPEAL AND ERROR.**ESTATES OF DECEDENTS.** See EXECUTORS AND ADMINISTRATORS.**ESTOPPEL.** See RELEASE, 2.**EQUITABLE ESTOPPEL.****Representations not known to be true, made as of knowledge: Reli-**

- 1 ance thereon: **Damage.** Representations made as of one's own

ESTOPPEL Continued**TO****EVIDENCE**

knowledge, which he does not know to be true, and which induce another to part with his money or property, fix liability. The maker will be estopped to plead that he did not intend to defraud. Emphatically true is this when the representations are made for a consideration and without due care. *Howard v. Natl. etc. Assoc.*, 719.

Inconsistent attitudes: Alleging contradictions: Partition fences.

2 He is not to be heard who alleges things contradictory to each other. *Myers v. Tallman*, 104.

Partition fences: Failure to maintain: Equal fault. No man can

3 take advantage of his own wrong. *Myers v. Tallman*, 104.

EVIDENCE. See APPEAL AND ERROR, 4a, 20, 21; ATTORNEY AND CLIENT, 1, 2; BURDEN OF PROOF; CONSPIRACY, 1; DAMAGES, 3, 7; FALSE IMPRISONMENT, 3; FALSE PRETENSES, 2; HOMICIDE, 5, 6; INTOXICATING LIQUORS, 4; PRESUMPTIONS; PRINCIPAL AND AGENT, 1; WITNESSES, 1-3.

RELEVANCY, MATERIALITY, AND COMPETENCY.

Similar contract with others: Railroad crossings. On the issue

1 whether a railway company had agreed to put in an undercrossing for plaintiff, evidence is admissible that the agents for the railroad had agreed with plaintiff's neighbor to put in such a crossing for the neighbor in connection with the crossing for plaintiff. *Hemphill v. Light Co.*, 498.

Parol to prove agreement to provide railroad crossing. Parol evidence

2 is competent to show an agreement by a railway company to furnish a railway crossing at a particular point, inasmuch as plaintiff was entitled to a crossing and the point in question was the only available place for a crossing. *Hemphill v. Light Co.*, 498.

BEST AND SECONDARY.

Letters to adversary: Secondary evidence of: Notice to produce.

3 "Notice to produce" is essential to the introduction of secondary evidence of the contents of letters written and sent to the ancestor under whom the party against whom the secondary evidence is offered claims. *Daniels v. Butler*, 65.

OPINION EVIDENCE.

Expert opinion: Physician's personal examination: Hypothetical

4 question. As to the cause which might have brought about the

TO EXECUTORS AND ADMINISTRATORS

Opinions: Liquors sold: Amount: Estimate. Under record, *held*
5 not objectionable to permit a witness, who kept no account of
sales of liquors, to state "about" how much of such liquors were
delivered at divers times. *Cvitanovich v. Bromberg*, 736.

APPOINTMENT.

Confirming request of testator. The nomination in a will of a certain
2 person as executor will be confirmed by the court unless strong
and persuasive reasons against so doing are made to appear.
In re Estate of Doolittle, 639.

Funeral expenses: What constitutes: "Monuments": Nursing: 3 Preferences. A monument is not strictly a "funeral expense" within the meaning of Sec. 3347, Code. A claim for "nursing" deceased during the last sickness, under the same section, is to be preferred to a claim for a monument. Therefore, the court in an insolvent estate properly ordered the payment of a claim for nursing before permitting an expenditure for a monument. In re Estate of Lester, 15.

Final report: Hearing thereon: Objections: Fraud of administrator.

Negligence of administrator: Loss: Liability. Whether an administrator can be held liable for mere negligence without bad faith. query. In re Estate of Miller, 24.

FALSE PRETENSES Continued
EVIDENCE.

TO

FENCES

Worthless check dated ahead: Effect. The fact that the worthless
2 check upon which money was obtained was dated ahead one day
has no effect upon defendant's guilt when the uncontradicted
testimony showed that when the money was obtained accused
represented that he *then* had money in the bank to meet the
check, when the evidence showed he had no money in the bank,
before, on, or after the date of the check. *State v. Cooper*, 571.

FALSE REPRESENTATIONS. See DAMAGES, 2; ESTOP-
PEL, 1.

FENCES.

POWER OF FENCE VIEWERS.

Partition fences: Drainage right of way. Lands taken for a right
1 of way for a public drainage ditch (Ch. 2-A, Tit. X, Sup. Code,
1913) are simply burdened with an easement—a right in the pub-
lic to use the land, unhampered and unimpeded, for drainage
purposes. Subject to this right, the owner (and he is still the
owner) may use the land as he pleases. The mere fact, therefore,
that a division line between two landowners lies within the drain-
age *right of way* but outside the actual channel does not oust the
power of the fence viewers to order the erection and maintenance
of partition fences on such division line. *Barton v. Boie*, 706.

DIVISION OF PARTITION FENCES.

Partition fences: "Hog tight": Streams: Applicability of statute.
2 Whether the law with reference to partition fences and the re-
quirements to keep same "hog-tight" is applicable to fences across
substantial streams, query. *Myers v. Tallman*, 104.

Partition fences: Undulating or horizontal measurement. Where
3 the fence viewers ordered a landowner to construct a certain
number of rods of partition fence, *held*, the specified number of
rods should be determined by measuring over the undulating sur-
face of the ground and not by a level horizontal measurement.
Myers v. Tallman, 104.

MAINTENANCE.

Partition fences across streams: "Hog-tight" requirement. Where
4 defendant was under legal orders to maintain the major portion

FENCES Continued **HOMICIDE**
TO
 of a required hog-tight partition fence across a stream and plaintiff was under like orders to maintain the remaining portion of such fence, plaintiff having originally secured the order that such fence be so maintained, *held*, that each was under obligation to so maintain his respective portion as to maintain equal pressure on the banks in high water. *Myers v. Tallman*, 104.

FRAUD. See **ANIMALS**, 1; **BILLS AND NOTES**, 3; **DEEDS**, 6; **EXECUTORS AND ADMINISTRATORS**, 4.

PLEADING.

Conclusion: Facts stated. Fraud is a conclusion from the facts
 1 stated. *Havner v. McGregor*, 5.

FRAUDS, STATUTE OF. See **BROKERS**, 2; **SPECIFIC PERFORMANCE**, 1.

FUNERAL EXPENSES. See **EXECUTORS AND ADMINISTRATORS**, 3.

GUARDIANSHIP. See **CERTIORARI**, 1.

HANDWRITING. See **WITNESSES**, 2.

HARMLESS ERROR. See **APPEAL AND ERROR**; **CRIMINAL LAW**, 7; **DAMAGES**, 6; **TRIAL**.

HOMICIDE.

MANSLAUGHTER.

Legal intent supplied by recklessness. That element of intent necessary to support manslaughter *inheres* in conduct showing a reckless disregard and indifference to the lives and safety of others, resulting in death. *State v. Biewen*, 256.

Gross carelessness: Sufficiency of evidence. Evidence reviewed and held to sustain a conviction for manslaughter in negligently driving an automobile over a child, both as to the identity of defendant and the acts of negligence. *State v. Biewen*, 256.

EXCUSABLE OR JUSTIFIABLE.

Self-defense: Right to continue. If the facts and circumstances are
 3 such as to justify in law the employment of self-defense, then

HOMICIDE Continued

such self-defense may be continued until it reasonably appears to defendant that the defendant or the one assaulted is out of danger. *State v. Nicola*, 171.

Self-defense: Warning to deceased: Necessity for. A "warning"

- 4 to deceased to desist from his assault is not, as a matter of law, a condition precedent to the right to employ self-defense. If a warning might be necessary, it is only in event that it appears to the defendant, as a reasonably prudent and cautious person, that such warning would have been all that was necessary to avoid death or great bodily harm to defendant or to the one defended. *State v. Nicola*, 171.

EVIDENCE.**Self-defense: Illicit relations of deceased with wife of accused: Hos-**

- 5 tile motive. Under a plea of self-defense, the accused should be permitted to show by a witness that he, the witness, had seen the deceased hugging and caressing the wife of the defendant and had reported such conduct to the defendant, because such evidence tends (a) to establish the existence of a hostile motive in the mind of deceased and (b) to show the apprehension of increased or greater danger on the part of defendant at the time of the fatal encounter. *State v. Thomas*, 591.

Manslaughter: Husband killing wife's paramour: Present provo-

- 6 cation. Evidence is not admissible, in order to reduce a homicide to manslaughter, that a husband killed his wife's paramour while he, the husband, was in a fury of high passion excited and instigated by the illicit relations, unless such offer of evidence is preceded by evidence that the provocation was present, that it was so recent that reason had had no reasonable time to take the place of high passion. If such reasonable time had elapsed beyond all reasonable doubt, then the court should exclude the evidence as a matter of law; if the court is in doubt, the safer course is to admit the evidence under proper instruction to the jury. *State v. Thomas*, 591.

TRIAL—INSTRUCTIONS.**Self-defense: Reputation of deceased: Relative strength: Right to**

- 7 instruction. Defendant is entitled to a specific instruction if requested that (a) threats made by the deceased against the one assaulted, (b) reputation of the deceased as a violent and dangerous man, (c) defendant's knowledge of such reputation, and (d)

TO

the relative strength of deceased and the one assaulted, are all relevant matters to be considered by the jury on the question of defendant's state of mind when he killed deceased. State v. Nicola, 171.

8 Threats of deceased to kill defendant's mother may be considered by the jury in determining the question whether defendant had reasonable grounds to believe that his mother was in imminent danger of death or great bodily injury from the deceased. Defendant is entitled to a specific instruction to this effect if requested. *State v. Nicola*, 171.

INCEST.

1 of incest may be convicted on the uncorroborated testimony of the prosecutrix unless she consents to the act and thereby becomes an accomplice. Non-consent may arise, of course, from immature years. State v. Stalker, 396.

DEFECTS IN FORM OR SUBSTANCE—WAIVER.

1 Waiver. Under the county attorney information law, an information filed without the approval of the judge (Sec. 5239-e, Sup. Code, 1913) may be set aside provided the motion is made before plea is entered by defendant. (Sec. 5239-m, Sup. Code, 1913.) Jones v. McClaughry, 281.

2 the form or substance of an indictment not made before the jury is sworn are waived. (Sec. 5289, Sup. Code, 1913.) State v. Cooper, 571.

INFORMATION TO **INTOXICATING LIQUORS**
INFORMATION. See **INDICTMENT AND INFORMATION.**

INJUNCTION.

TRESPASS—WASTE.

Proper action. An action in equity for injunction is a proper action
 1 to prevent the cutting down of trees, removing fences and destroying fixtures. *Fallers v. Hummel*, 745.

INSANE PERSONS. See **ARREST**, 1.

JUDGMENTS AGAINST—VACATION.

Disclaimer of interest in lands: Action to set aside: Degree of proof
 1 **necessary.** A disclaimer of all interest in lands, the subject of partition proceedings, and the entry of a decree excluding the one filing the disclaimer from all interest in the lands, will not be set aside on the application of a subsequently appointed guardian, except upon very clear and conclusive proof of mental incapacity. *Roberts v. Bissell*, 392.

INSANITY. See **CRIMINAL LAW**, 1.

INSTRUCTIONS. See **APPEAL AND ERROR**, 2, 13; **CRIMINAL LAW**; **HOMICIDE**, 7, 8; **TRIAL**, 7-12.

INTEREST.

Waiver by accepting principal. Acceptance of the principal of a debt
 1 does not bar an action for unpaid interest, especially when there was an agreement that the claim for interest should not be considered waived by the acceptance of the principal sum. *Kretzinger v. Emering*, 59.

INTERROGATORIES. See **TRIAL**.

INTOXICATING LIQUORS.

ABATEMENT OF NUISANCE.

Injunction: Serving at hotel: What constitutes selling, bartering,
 1 **etc.** The proprietor of a hotel neither "sells, barterers, gives away or dispenses" intoxicating liquors within the meaning of Sec. 2382, Sup. Code, 1913, (a) by permitting guests to drink such liquors with their meals, which liquors they themselves brought to the

INTOXICATING LIQUORS Continued

hotel, or (b) by permitting the waiters to serve to guests liquors so brought to the hotel by the guests, or (c) by the unauthorized and forbidden act of waiters going out and buying liquors for guests, which guests sometimes paid for in advance and sometimes when the same were delivered, or (d) by the act of a tenant of the hotel going out and buying liquors for such guests, the proprietor keeping no liquors and deriving no advantage from such supplying of liquors, and, therefore, cannot be enjoined. *Barber v. Kirkwood*, 619.

Permit holder: Malt liquor: Beverage. A permit holder cannot
2 legally sell a *malt* liquor containing alcohol and which could be and was used as a beverage. To legally sell that which contains a malt liquor its distinctive character must be so changed that it becomes incapable of use as a beverage. Evidence held to show that "Pabst Extract" was a malt liquor. *Berner v. McHenry*, 483.

Unlawful sale: Temporary injunction: Failure to answer or testify.
3 Failure of a defendant, in an action to enjoin a liquor nuisance, to file answer or testify in explanation of any of the evidence against him may be considered and given due weight on the question of granting the temporary writ. *Smith v. Tate*, 680.

Evidence: Federal liquor tax receipt: Presumption. The posses-
4 sion of a Federal intoxicating liquor tax receipt raises a presumption that the holder is engaged in the unlawful sale of intoxicating liquors, whether the action at bar be civil or criminal. (Sec. 2427, Code 1897.) But the holder has the right to explain his possession of such receipt and thereby nullify the statutory presumption. *Cvitanovich v. Bromberg*, 736.

STATEMENT OF CONSENT.

Duty to canvass all statements: Statutory construction. A partic-
5 ular expression in one part of a statute, not so large and extensive in its import as other expressions in the same statute, will yield to the larger and more extensive expressions, when the latter embody the real intent of the legislature. *Barber v. De Ford*, 692.

Filing: Withdrawal of name: Withdrawal of withdrawal. A state-
6 ment of consent for the sale of intoxicating liquors being filed with the county auditor, the filing thereafter of a withdrawal of a name has the effect *eo instante* of removing said name from said statement, and said name cannot thereafter be reinstated

INTOXICATING LIQUORS Continued **TO** **LEX LOCI REI CITAE**
on said statement—in other words, after said statement is so
filed, the law will recognize and give force to a withdrawal but
will not recognize or give force to a withdrawal of a withdrawal.
Barber v. De Ford, 692.

Signing by "mark." A voter may sign a statement of consent for the
7 sale of intoxicating liquor "by mark." Barber v. De Ford, 692.

Incorrect poll book: Signatures to correspond: Identity. If the
8 voter's name appears on the poll book in an incorrect form he may
properly sign a liquor consent statement in such incorrect form
but the evidence must be such that it fairly appears that the
incorrect name on the poll book represented and stood for this
particular voter. Barber v. De Ford, 692.

Affidavit to signatures: Foreign notary. An affidavit in verification
9 of the signature of a signer of a statement of consent for the
sale of intoxicating liquor, reciting as having been made before
a notary public in and for Polk County, Iowa, but whose seal
showed him to be a notary public for St. Johns County, Florida,
is a nullity. Barber v. De Ford, 692.

Verification of names: Foreign notary. An affidavit in verification
10 of the signature to a statement of consent for the sale of intoxi-
cating liquors may be made before a notary public in a foreign
state, such notary properly signing his name as such. The pre-
sumption that such notary acted *in the county* where he was
authorized to act is not overthrown by a caption reading: "State
of Iowa, Polk County, SS." Barber v. De Ford, 692.

JUDGMENT. See CRIMINAL LAW, 10, 11; INSANE PERSONS, 1.

JURISDICTION. See DIVORCE, 7; EQUITY, 1.

JURY. See APPEAL AND ERROR, 12.

TRIAL BY JURY—WAIVER.

Waiver under statute: Construction of record. Right to jury may
1 be waived by implication, but it will require a clear case. Doubts
will be resolved against the waiver. *Held*, the record failed to
show a waiver. Timonds v. Hunter, 598.

LEX LOCI CONTRACTUS. See CONTRACTS, 1.

LEX LOCI REI CITAE. See CONTRACTS, 1.

LIEN **TO** **MASTER AND SERVANT**
LIEN. See **ATTORNEY AND CLIENT**, 3; **MECHANICS' LIEN**;
VENDOR AND PURCHASER, 1.

LIFE ESTATES. See **WILLS**, 2.

LIMITATION OF ACTIONS.

ACCRUAL OF ACTION.

Deed conveying dower: Action to set aside: When action accrues.

- 1 An action to set aside a deed executed July 19, 1899, conveying contingent dower, on the ground of mental incapacity and undue influence, was not barred by statute of limitation, Sec. 3447, Par. 7, Sup. Code, 1913, (providing a period of ten years in which to recover real property), when commenced December 2, 1910, the spouse seized of title having died June 29, 1905. *Baker v. Baker*, 473.

COMMENCEMENT OF ACTION.

What constitutes. The actual service of an original notice of suit is

- 2 the "commencement" of an action, and tolls the statute of limitation, even though the petition subsequently filed states the accrual of the action materially different than as stated in said notice, said petition stating a date such that, had no notice been served, the action would have been barred prior to the filing of the petition. (Secs. 3450, 3514, Code.) *Parkhill v. Storage Co.*, 455.

PLEADING STATUTE.

Necessity to plead: General equitable demurrer: Insufficiency. A

- 3 general equitable demurrer does not raise the question of the statute of limitation. *Havner Land Co. v. MacGregor*, 5.

MALICIOUS PROSECUTION. See **FALSE IMPRISONMENT**.

MANSLAUGHTER. See **HOMICIDE**.

MARRIAGE. See **CONTRACTS**, 2.

MASTER AND SERVANT.

ACTION FOR WAGES.

Verdict: Sufficiency of evidence to support. Evidence reviewed and

- 1 held sufficient to support a verdict on the contract of employment alleged. *Wiefenbach v. Lamp*, 30.

MASTER AND SERVANT Continued

TOOLS, MACHINERY AND APPLIANCES.

Safe tools: Repair: Ocular inspection of defect: Negligence.

- 2 Merely looking at or superficially inspecting the external conditions of an appliance or tool furnished the servant for the performance of work may not satisfy the full measure of the master's duty to furnish reasonably safe appliances, when the servant's safety depends upon the soundness of the material, the sufficiency of a repair, or the firmness of the separate parts of the appliance. *Parkhill v. Storage Co.*, 455.

Personal Injury: Knowledge of defect: Instruction. Under an

- 3 issue whether defendant was negligent in directing plaintiff to move a piano with a truck which defendant knew was broken, defective and unsafe, it is declared that "if, in the exercise of reasonable care, defendant *should* have known of the defective condition of the truck, and without knowing or without using reasonable care to ascertain the condition of the truck, defendant directed plaintiff to use and move the piano with it, then defendant was negligent." Instruction in instant case held to be the equivalent of this statement of the law. *Parkhill v. Storage Co.*, 455.

Care required: Instructions. There is no essential difference between

- 4 instructing that the master must furnish "reasonably safe machinery" and instructing that the master must exercise "reasonable care to furnish safe machinery." *Cashman v. Powder Co.*, 306.

WARNING AND INSTRUCTING SERVANT.

Self-evident dangers. The master is under no duty to warn a servant

- 5 of dangers self-evident to anyone, skilled or unskilled. *Meyers v. Bennett*, 383.

CONTRIBUTORY NEGLIGENCE OF SERVANT.

Servant's right to presume master's performance of duty. On the

- 6 question whether the servant had exercised reasonable care, the jury may be told that the servant had the right to presume, in the absence of knowledge to the contrary, that the master had performed his duty to exercise reasonable care in furnishing the implements with which the servant was required to perform his work. *Parkhill v. Storage Co.*, 455.

MASTER AND SERVANT Continued TO MECHANICS' LIEN
PLEADING.

Negligence: Assumption of risk. (A) A plea of "assumption of risk incident to the employment" adds nothing whatever to a general denial.

(B) A plea of "assumption of risk incident to the master's negligence" is an affirmative defense and must be specially pleaded. (Sec. 3629, Code.) *Cashman v. Powder Co.*, 306.

LIABILITY TO THIRD PERSONS.

Torts of servant: Course of employment. A principal is not liable for the torts which his agent commits when not acting in the course of the employment. *Jolly v. Doolittle*, 658.

MECHANICS' LIEN.

RIGHT TO LIEN.

Claim of subcontractors against public corporations: Drainage districts. A material man furnishing material to the principal contractor engaged in constructing a drainage improvement under Chapter 2-A, Title X, Supp. Code, 1913, is not entitled to a so-called mechanic's lien under Sec. 3102 of the Code, against the county whose board of supervisors enter into a contract on behalf of the drainage district for the construction of such improvement. (But now see Sec. 1989-a57, Supp. Code, 1913.) *Tile Co. v. Parks*, 438.

Equitable claim to fund: Failure to show amount due. A subcontractor, seeking to establish an equitable claim to a fund in the hands of a county for the payment of a drainage improvement, must at least show the amount due the principal contractor from the county, especially when the contractor has assigned his contract to another party. *Tile Co. v. Parks*, 438.

PROCEEDINGS TO PERFECT.

Sworn statement: Who may make: Qualifications. The "itemized sworn statement of the demand" required by Sec. 3102 of the Code, as the basis for the establishment of a so-called mechanic's lien against a public corporation, is sufficient when made by one who shows therein such general qualifications as are necessary for the verification of a pleading by a party other than plaintiff or defendant. *Ludowici v. Dist.*, 669.

**MECHANICS' LIEN Continued TO MUNICIPAL CORPORATIONS
OPERATION AND EFFECT.**

Public corporation: Right to make payments: Material men. The
4 right of a material man, under Sec. 3102, Code, to establish a claim against the fund for the erection of a public building, is subject to the right of the public corporation to make payments in accordance with its contract, and it is immaterial whether such payments be in money or in that which is treated as its equivalent. *Ludowici v. Dist.*, 669.

Public building: Abandonment by contractor: Right of municipality
5 **to complete: Payments: Bond.** A school district may, though not authorized so to do and though protected by a bond taken under Sec. 2779, Code, complete its partially erected building when abandoned by the contractor (the sureties refusing to complete) and may apply the unpaid payments under the contracts to the cost of such completion, even though this defeats the material man in his attempt to establish a lien on the fund under Sec. 3102, Code. The municipality is not forced to an action on the bond to recover the cost of completion. *Ludowici v. Dist.*, 669.

Municipal corporations: Payments in excess of contract: Burden of
6 **proof.** The burden of proof to show that payments, under a contract for the erection of a public building, were in excess of those provided for in the contract, rests on the material man who seeks to establish a claim against the public corporation, under Sec. 3102 of the Code. *Ludowici v. Dist.*, 669.

MENTAL ANGUISH. See DAMAGES, 10; TELEGRAPHS AND
TELEPHONES, 3.

MENTAL INCAPACITY. See DEEDS, 2-4, 6, 7.

MISTAKE. See RELEASE, 1, 2.

MOTIVE. See HOMICIDE, 5.

MUNICIPAL CORPORATIONS. See MECHANICS' LIENS.

DEFECTS OR OBSTRUCTIONS IN STREETS, ETC.

Negligence: Obstruction in street: Proximate cause. One injured
1 by being hit by a barrel stave which a policeman kicked out to the street cannot predicate liability against the city on the amount that the city was maintaining an unlawful obstruction *Price v. street. Evans v. City*, 321.

MUNICIPAL CORPORATIONS Continued to

NEGLECT

Defective streets: Nuisance. A city cannot escape liability for a
2 defect in its street on the fact that the defect did not amount
to a nuisance. *Raine v. City*, 388.

Reciprocal rights and duty of city and property owner: Negligence.

- 3 Liability of a city by reason of the condition of its streets must
rest on some breach of its statutory duty (Sec. 753, Code) over
its streets. In determining whether the city has breached its
duty, it must be remembered that the private property owner,
during his building operations, has a right to a reasonable use of
the street and the conduct of the city must be fairly judged in
the light of that fact. *Holmquist v. Const. Co.*, 502.

Obstruction in street: Notice, knowledge, responsibility: Failure to
4 show. The existence of an obstruction in a public street does not,
of itself, convict the city of negligence. *Evans v. City*, 321.

Defect in street: Notice: Jury question. Knowledge of an excava-
5 tion and obstruction in a much frequented street may be found
from the fact that the city engineer, under authority, authorized
the excavation and, by ordinance, the duty to superintend the
work rested on the superintendent of streets, the work having
proceeded for two days before the accident. *Frohs v. City*, 431.

NAMES. See INTOXICATING LIQUORS.

RULES TO DISTINGUISH.

Christian: Rules to determine identity.

1. The Christian name of a person may consist of one or
more letters only.
2. Where one or more *letters* appear as the Christian name
they are treated, in the absence of any showing to the contrary,
as the Christian name which the person has assumed.
3. There is no presumption that a *letter* or that *letters* stand
for *other* names and are not themselves the Christian name.
4. When two or more Christian *names* are used, the middle
name or letter is quite generally disregarded, not because it is
not a part of the Christian name but because not essential to the
identification of the person.
5. When the given *name* is written, the middle name or letters
may be disregarded in identifying the person. *Barber v. De Ford*,
692.

NEGLECT. See BAILMENT, 1; EXECUTORS AND ADMIN-
ISTRATORS, 5; MASTER AND SERVANT; MUNICIPAL CORPORA-

NEGLIGENCE Continued

**TIONS, 1-5; RAILROADS, 1-6; RELEASE, 2; TELEGRAPHS AND
TELEPHONES, 1-3; TRIAL, 10.**

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

Unusual and unforeseen accidents: Ordinary care: Workmen blown
1 from building. Whether a builder erecting a building near and adjacent to a public street should, in the exercise of ordinary care, have provided barriers, warning signals or a covering over the sidewalk, and thereby guarded against the unusual occurrence of a workman being blown from the walls upon a passer-by, held to be a jury question. *Holmquist v. Const. Co.*, 502.

Barriers on streets: Removal on orders of city: Effect on builder's
2 liability. The removal, in compliance with orders of a city official, of barriers over a sidewalk in front of a partially erected building, will not absolve the builder from liability if the builder in the exercise of ordinary care knew that such removal would open up an avenue of danger to passers-by. Orders or no orders, the builder must exercise reasonable care. *Holmquist v. Const. Co.*, 502.

Precautions: Duty fulfilled: Non-necessity to do more. When that
3 which is done is all that ordinary prudence requires in order to warn travelers of obstructions in streets, it is not negligence to omit other precautions, even though required by ordinance, when the doing of the thing omitted would afford no additional protection. *Frohs v. City*, 431.

Railroads: Negligence per se: Violation of statutory duty. The
3a violation of a statute imposing a duty is negligence *per se*. Rule applied in instant case for failure to blow the whistle and ring the bell on a railway engine on approaching a crossing as required by Sec. 2072, Code. *Hough v. Railroad*, 224.

PROXIMATE CAUSE OF INJURY.

Causal connection. Liability must be predicated on a cause that
4 is proximate. In instant case, held that the order of a commissioner of public streets to a building contractor to remove barriers which excluded pedestrians from the sidewalk was not the proximate cause of the death of a pedestrian who was killed by being struck by the body of a workman blown from the building by a high wind. *Holmquist v. Const. Co.*, 502.

NEGLIGENCE Continued TO NEW TRIAL

Act of God: When no protection. One will not be permitted to screen
 5 himself behind an act of God, when his own contributory negligence concurred with such act to bring about the accident. *Holmquist v. Const. Co.*, 502.

CONTRIBUTORY NEGLIGENCE.

Contributory *per se*: Facts not constituting. Whether a pedestrian
 6 walking along a public street in front of a building in process of erection and hit by a falling workman who was blown from the building was guilty of contributory negligence, *held* to be a jury question. *Holmquist v. Const. Co.*, 502.

Customary way of doing act: Contributory negligence *per se*. Contributory negligence *per se* cannot be pronounced on the act of doing a certain thing in the customary way and in the manner directed by the foreman in charge. *Cashman v. Powder Co.*, 306.

Contributory *per se*: Facts not constituting. A fair conflict in the
 8 evidence renders the question of plaintiff's contributory negligence one for the jury. *Menefee v. Whisler*, 19.

NEGOTIABLE INSTRUMENTS. See **BILLS AND NOTES.**

NEW TRIAL. See **CRIMINAL LAW**, 5-9; **TRIAL.**

POWER OF COURT TO GRANT.

Inherent power of judge. A "new trial" may be ordered by a trial
 1 judge by virtue of his inherent power, even though our statute provides a procedure for the granting of a new trial "on the application of the party aggrieved." (Sec. 3755, Code.) *Thomas v. Railroad Co.*, 337.

DISCRETION OF COURT.

Granting by trial court: Reluctance to overturn. It must be a clear
 2 case, indeed, to warrant the appellate court in overturning the action of the trial court in granting a new trial, especially when the reason assigned is that the verdict is contrary to the evidence. *Thomas v. Railroad*, 337.

Motion assigning several grounds: Sustained generally: Effect.
 3 The granting of a new trial generally under a motion assigning several grounds therefor will not be disturbed if *any* of the grounds are tenable. *Thomas v. Railroad*, 337.

NEW TRIAL Continued TO PARTITION
MISCONDUCT OF JURORS.

Proceeding with trial: Waiver. Misconduct of a juror is not ground
4 for a new trial when with full knowledge of the misconduct the
cause proceeded without objection and the misconduct was not of
a nature to prejudice the complaining party. *Crull v. Louisa*
Co., 199.

Prejudice presumed. Misconduct of jurors considered and *held* to be
5 such as to justify the presumption of prejudice and to demand a
new trial. *Jolly v. Doolittle*, 658.

NEWLY DISCOVERED EVIDENCE.

Diligence. "Due diligence" in the discovery of new matters of evi-
6 dence is not shown when such new matters might have been
readily brought out from the same witness when he was testi-
fying at the trial. *Youtsey v. Lemley*, 401.

PROCEEDINGS TO PROCURE.

Petition for filed within year: Amendment after year. A petition
7 for new trial may be filed as late as one year after the entry
of judgment under exceptional circumstances. (Sec. 4092, Code.)
But, conceding that such petition is amendable, it must be per-
fected within said one year. New and independent grounds for
new trial cannot be injected into the petition under cover of
amendments filed *after* said one year. *Hall v. Feagins*, 495.

NON-USER. See CONTRACTS, 6.

NOTARIES. See INTOXICATING LIQUORS, 9, 10.

NOTICE TO PRODUCE. See EVIDENCE, 3.

OPTION. See CONTRACTS, 5.

ORIGINAL NOTICE. See PROCESS.

PARTITION. See WILLS, 3.

TAXES, CREDIT FOR.

Tax sale: Reimbursement. Owners, on partition, are entitled to
1 reimbursement out of the property as a whole for the amount
necessarily paid to effect redemption from tax sale. *Price v.*
Ewell, 206.

PARTITION Continued

TO

PLEADING

APPEAL—TRIAL DE NOVO.

Determination of shares: Remand. The trial *de novo* of partition
2 proceedings involves the determination of the respective shares
without remand to the lower court. Price v. Ewell, 206.

PARTNERSHIP.

CREATION OF RELATION.

Evidence: Sufficiency. Evidence reviewed and held insufficient to
1 show the existence of a partnership. Bettinger v. Bettinger, 40.

AUTHORITY OF PARTNER.

Private affairs of co-partner. It is very elementary that a partner-
2 ship relation alone gives one partner no authority to contract
with reference to the private contracts of his co-partner. Yout-
sey v. Lemley, 401.

PAYMENT.

PLEADING.

Burden of proof. Payment is an affirmative defense with the burden
1 of proof on him who alleges it. Youtsey v. Lemley, 401.

PEDIGREE. See ANIMALS.

PERSONAL TRANSACTIONS WITH DECEASED, ETC.

See WITNESSES, 1-3.

PLEADING. See APPEAL AND ERROR, 16; BOUNDARIES, 2;
CONTINUANCE, 1; FRAUD, 1; LIMITATION OF ACTIONS, 3;
MASTER AND SERVANT, 7; PAYMENT, 1; PRINCIPAL AND
AGENT, 3; SPECIFIC PERFORMANCE, 1; TELEGRAPHS AND
TELEPHONES, 1.

AMENDMENT—DISCRETION TO ALLOW OR REJECT.

Rejection: Discretion of court. The striking of an amendment at
1 the close of the trial, pleading a written contract instead of the
oral one formerly pleaded, because filed too late, is held in
instant case to have been within the discretion of the court.
Brown v. Pearson, 50.

PLEADING Continued TO PROCESS
ISSUE, PROOF AND VARIANCE.

Surplusage: Non-necessity to prove. A party shall not be compelled
2 to prove more than is necessary to entitle him to the relief asked.
(Sec. 3639, Code.) *Raine v. City*, 388.

PRESUMPTIONS. See APPEAL AND ERROR, 13; BILLS AND
NOTES, 3, 4; COSTS, 1; INTOXICATING LIQUORS, 4; MASTER
AND SERVANT, 6; WORK AND LABOR, 1.

PRINCIPAL AND AGENT. See MASTER AND SERVANT, 1;
TRUSTS, 1-3.

EXISTENCE OF RELATION—EVIDENCE.

How proven: Declaration of agent. Agency cannot be established
1 by the declarations of the alleged agent. *Jolly v. Doolittle*, 658.

DUTY OF AGENT—LOYALTY.

Authority of agent to employ: Employment of agent's minor son:
2 **Validity.** An agent, authorized by his principal to employ neces-
sary help, may not employ his own minor son. "Loyalty to his
trust, the first duty of the agent," is a rule of law so inflexible
that he will not be permitted to do that which may even tempt
him to do wrong. *Daus v. Short*, 1.

RATIFICATION OF UNAUTHORIZED ACTS.

Pleading: Ratification: Burden of proof. He who pleads ratifica-
3 tion of the unauthorized acts of an agent must establish the
ratification. *Hink v. Smith*, 101.

PROCESS. See DIVORCE, 7.

SERVICE.

Nonresident: Foreign corporation: Jurisdiction over: "Agency."
1 (A) Jurisdiction of a foreign corporation may be obtained by
service (a) upon any general agent of such corporation or (b)
upon any other agent or person transacting the business thereof
in the county where the action is brought. (Sec. 3529, Sup. Code,
1913.)
(B) When a corporation, company or individual has, for the
transaction of any business, an office or agency in any county

PROCESS Continued TO RAILROADS
 other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. (Sec. 3532, Code.) *Murphy v. Develop. Co.*, 542.

PUBLIC POLICY. See **CONTRACTS**, 2.

RAILROADS. See **TAXATION**, 1-5.

ACCIDENTS AT CROSSINGS.

Negligence: Guest relying on driver: "Look and listen" rule. The

- 1 standard of reasonable care required of a mere *guest*, in approaching a railroad crossing, and riding in a conveyance on the invitation of another, may be and ordinarily is markedly different than the standard required of the driver over whose actions the *guest* has no control. The *guest* may have the right to rely on the driver "to look and listen." Material considerations are (a) the position of the guest in the conveyance, (b) whether the guest participated in the negligence of the driver, and (c) whether the driver was known to be incompetent, etc. *Thomas v. Railroad*, 337.

Negligence: Statutory signals: Failure to give: Liability of em-

- 2 ployees. The employees of a railway company, as well as the company itself, are liable in damages for death resulting in failure to blow the whistle and to ring the bell on approaching a crossing as required by Sec. 2072, Code, said section creating no new cause of action but a "rule of evidence" as to what acts constitute negligence *per se*. *Hough v. Railroad*, 224.

Negligence per se: Vegetation along right of way. Whether per-

- 3 mitting weeds and brush to grow along right of way so as to obstruct view of trains near crossing constitutes negligence *per se*, *query*. *Hough v. Railroad Co.*, 224.

Contributory negligence: Facts reviewed. Evidence reviewed and

- 4 *held*, question of contributory negligence was for the jury. *Hunt v. Delano*, 138; *Hough v. Railroad Co.*, 224.

UNDERCROSSINGS.

Duty to maintain in safe condition. A railway company must main-

- 5 tain an undercrossing in a reasonably safe condition, it being shown that the company had agreed to provide the crossing at

SENTENCE. See CRIMINAL LAW, 10, 11, 11a.

SERVICE TO **STATUTORY CONSTRUCTION**
SERVICE. See **PROCESS.**

SPECIAL INTERROGATORIES. See **TRIAL.**

SPECIAL TAXES. (**ELECTIONS.**) See **ELECTIONS, 1.**

SPECIFIC PERFORMANCE. See **ADOPTION, 1.**

Statute of frauds: Trusts: Construction of pleading. No claim for
1 "specific performance of an oral contract for the creation and transfer of an interest in land," in violation of Sec. 4625, Par. 4, of the Code, nor an attempt to establish an express trust by oral evidence, in violation of Sec. 2918 of the Code, is presented by a pleading alleging that defendant entered into a written contract in his own name for the purchase of lands and thereunder claimed all interest in said land, in violation of an agreed oral contract of agency between plaintiff and defendant by which defendant agreed, for a stipulated consideration, to buy said lands for plaintiff and on terms which plaintiff had directed defendant to accept, followed by a prayer that defendant be enjoined from transferring his seeming interest in said contract and be compelled to assign the same to plaintiff. *Havner v. McGregor*, 5.

STATUTE OF FRAUDS. See **FRAUDS, STATUTE OF.**

STATUTE OF LIMITATIONS. See **LIMITATION OF ACTIONS.**

STATUTES. See **INTOXICATING LIQUORS, 5; SCHOOLS AND SCHOOL DISTRICTS, 1; TAXATION, 1-5.**

CONSTRUCTION.

Intent: Substituting words. The fundamental rule in construing a
1 statute is to preserve every word thereof and to give such effect to all parts of the enactment as will reflect the legislative intention. To comply with this rule the court will, when necessary, give to a word a meaning different from its ordinary meaning when such was the manifest intention of the legislature, and it is necessary in order to preserve and give force to all words of the enactment. *State v. Booth*, 143.

Conjunctive and disjunctive terms. "Or" may be read "and" if the
2 context justifies such interpretation. *Mitchell v. Ry. Co.*, 237.

STATUTORY CONSTRUCTION. See **INTOXICATING LIQUORS, 5; SCHOOLS AND SCHOOL DISTRICTS, 1; STATUTES, 1, 2; TAXATION, 1-5.**

TAXATION

TO

TELEGRAPHS AND TELEPHONES

TAXATION.**RAILROAD AID TAX.**

Constitutionality. The statute (Secs. 2091-b to 2091-f, Sup. Code, 1 1913) authorizing the voting of a tax in aid of electric railways is constitutional. *Mitchell v. Ry. Co.*, 237.

Statutes: Strict construction. A statute authorizing the voting and 2 levy of a tax in aid of the construction of an electric railroad is in derogation of the common law and is to be most strongly construed against the railway company. *Mitchell v. Ry. Co.*, 237.

Statutory requirements exclusive. The statutory requirements as to 3 what shall be done in order to legally vote a tax under Sec. 2091-b, Sup. Code, 1913, in aid of a railway are exclusive of all other requirements. *Mitchell v. Ry. Co.*, 237.

Graduating tax: Power of legislature. The legislature may consti- 4 tutionally authorize the levy of a tax in aid of a railway without requiring all the lands benefited to be included in the taxing district and without grading such tax according to benefits. *Mitchell v. Ry. Co.*, 237.

Formation of district: Delegation of power. The legislature may 5 delegate to other bodies or persons the power to fix the limits of the taxing district wherein it is proposed to vote a tax in aid of a railroad. In the absence of fraud or gross abuse of discretion such district will not be disturbed by the courts. *Mitchell v. Ry. Co.*, 237.

TELEGRAPHS AND TELEPHONES. See DAMAGES, 1, 4, 5.**DELAY OR FAILURE TO DELIVER MESSAGE.**

Nature of action: Negligence: Tort: Pleading. The action under 1 the pleading charging gross and excessive carelessness and negligence in failing to deliver a message construed as sounding in tort. *Bernstein v. Telegraph Co.*, 115.

Death message: Delay: Proximate results. A death message car- 2 ries a common-sense suggestion that negligent delay in delivering will bring grief to someone, and just how need not be brought to the attention of the one assuming the duty to deliver. *Albrook v. Telegraph Co.*, 412.

TELEGRAPHS AND TELEPHONES Continued to

TRIAL

Death message: Delay: Mental anguish: Evidence: Sufficiency.

- 3 Evidence reviewed and *held*, in an action for negligent delay in delivering a death message, that plaintiff suffered mental anguish and consequent damages by not meeting his relatives as soon as he otherwise would. *Albrook v. Telegraph Co.*, 412.

TORT. See TELEGRAPHS AND TELEPHONES, 1.

TRANSACTIONS WITH DECEASED, ETC. See WITNESSES, 1-3.

TRANSCRIPT. See APPEAL AND ERROR, 7, 8.

TRIAL. See CONTINUANCE, 1.

SEPARATION AND EXCLUSION OF WITNESSES.

- Discretion of court. The matter of excluding witnesses from the
1 courtroom during trial and what exceptions may be properly
made to such order of exclusion is peculiarly within the discretion
of the court. *Crull v. Louisa Co.*, 199.

ARGUMENTS AND CONDUCT OF COUNSEL.

- Wealth of litigants. The law has but one standard for rich and poor
2 alike—"a fair trial." The injection into a trial of the relative
wealth of the litigants, either by direct questions or insinuations
in argument before the jury, is offensive to the high ideals of the
law. Not even the curative qualities of a rebuke by the court
will always remove the reversible character of such conduct.
Cvitanovich v. Bromberg, 736; *Bisgaard v. Duvall*, 711.

- Rebuke by court: Caution to jury: Nonreversible error. Arguments
3 aside the record are, of course, improper, but the action of the
court in promptly rebuking such argument, with direct caution
to the jury to disregard the same, has large curative power.
Parkhill v. Storage Co., 455.

- Improper argument versus improper argument: Effect. One cannot
4 well complain of an improper argument which has been provoked
by his own improper argument. *Maine v. Rittenmeyer*, 675.

DIRECTION OF VERDICT.

- Test to determine: Allowable inferences. When the court is met by
5 motion to direct a verdict it should carry to the aid of the evi-

TRIAL Continued

dence every permissible inference in support of the issues. In instant case, motion improperly sustained. *Bank v. Hall*, 218.

When permissible: Conflicting evidence. Verdict should not be directed when the evidence is such as to (a) support a verdict for plaintiff in some amount, or (b) support a verdict for plaintiff on a contested issue. *Hink v. Smith*, 101.

INSTRUCTIONS—FORM, REQUISITES AND SUFFICIENCY.

Correct but not explicit: Waiver. If instruction is correct, as far as it goes, though not as explicit or limited as desired, request must be made for the more explicit or limited instruction, or the right thereto, if it exists, will be waived. *Albrook v. Telegraph Co.*, 412.

Assumption of fact. Instruction covering the circumstances which might excuse one in signing a release without reading, reviewed, and held not to be guilty of the vice of assuming the truth of facts in issue. *Platt v. Plaster Co.*, 330.

"Summing up" fact propositions. It is fit and proper for the court, after the detailed instructions are given, to briefly and tersely "sum up" the fact propositions upon which recovery depends. Instruction in instant case held proper. *Cashman v. Powder Co.*, 306.

INSTRUCTIONS REQUESTED.

Refusal to give: Issues otherwise covered: Contributory negligence. The refusal of an instruction on contributory negligence is justified when the court fully directed the jury as to the duty of plaintiff to exercise reasonable care and directed a verdict against him if he did not. *Cashman v. Powder Co.*, 306.

Instructions refused: Issues otherwise covered. Instruction covering the question whether plaintiff was a volunteer, reviewed and held to fully cover the instruction refused. *Cashman v. Powder Co.*, 306.

INSTRUCTIONS—OBJECTIONS AND EXCEPTIONS.

Instructions not submitted to counsel: When objection timely. An objection to an erroneous instruction, not submitted to counsel before being read, as required by Sec. 3705-a, Sup. Code, 1913, is timely if made for the first time in a motion for new trial. *Thomas v. Railroad*, 337.

TRIAL Continued TO TRUSTS
 VERDICT—SPECIAL INTERROGATORIES AND FINDINGS.

Special interrogatories: When properly refused: Ultimate fact. A
 13 special interrogatory should not be submitted unless it calls for
 an ultimate fact. *Maine v. Rittenmeyer*, 675.

Special interrogatories: Refusal: When nonprejudicial. When the
 14 fate of defendant's defense rested on one simple question of fact
 which was clearly submitted to the jury in the instructions and
 the verdict was adverse to defendant, the refusal to submit a
 special interrogatory calling upon the jury for an answer to this
 ultimate question was nonprejudicial. The verdict necessarily
 included a finding. *Maine v. Rittenmeyer*, 675.

Verdict: Special finding: Which must yield. A special finding which
 15 negatives the existence of the ultimate question upon which
 plaintiff seeks recovery overthrows the verdict for plaintiff.
 (Secs. 3728, 3778, Code.) *Jolly v. Doolittle*, 658.

VERDICT—EXCESSIVENESS.

Exemplary damages. The court cannot substitute its judgment in
 16 place of the judgment of the jury as to the amount of exemplary
 damages to be allowed. *Jolly v. Doolittle*, 658.

BY COURT—RECEPTION OF EVIDENCE.

Equity cause: Court viewing premises: Applying evidence. Error
 17 cannot be predicated on the fact that in the trial of an equity
 cause the court, by consent of both parties, viewed the premises,
 it not appearing that the court in such viewing of the premises
 did more than apply the evidence. *Melson v. Ormsby*, 522.

TRUSTS. See SPECIFIC PERFORMANCE.

RESULTING TRUSTS.

Agent: Violation of duty. An agent, taking the legal title to prop-
 1 erty in his own name in violation of his fiduciary duty, will be
 treated, in equity, as a trustee of the property for his principal.
Havner v. McGregor, 5.

Purchase by agent: Purchase price. A "resulting trust" in lands
 2 may be established by reason of the fraud of defendant in taking
 a contract for the purchase of lands in his own name, in violation

TRUSTS Continued

TO

WILLS

of his agreement to buy the lands for plaintiff, even though plaintiff has paid no part of the purchase price, plaintiff having tendered to defendant the amount which he, defendant, had paid. *Havner v. McGregor*, 5.

Express agreement: Fraud. Reliance on an express agreement is no
3 obstacle to the establishment of a resulting trust, if the essential
element of fraud is shown. *Havner v. McGregor*, 5.

Evidence of: Sufficiency. Evidence reviewed and held insufficient to
4 establish a resulting trust. *Bettinger v. Bettinger*, 40.

UNDUE INFLUENCE. See **DEEDS**, 2-8; **LIMITATION OF ACTIONS**, 1.

VENDOR AND PURCHASER. See **CONTRACTS**, 7.

LIEN.

Waiver: Action at law. One having a vendor's lien may waive the
1 same and sue at law for the amount due. *Kretzinger v. Emerging*, 59.

VERDICT. See **CRIMINAL LAW**, 12; **DAMAGES**, 8-10; **TRIAL**.

WAIVER. See **ACTION**, 3; **APPEAL AND ERROR**, 2, 12;
CRIMINAL LAW, 4; **INDICTMENT AND INFORMATION**, 1, 2; **INTEREST**, 1; **JURY**, 1; **NEW TRIAL**, 4; **TRIAL**, 7; **VENDOR AND PURCHASER**, 1.

WASTE. See **INJUNCTION**, 1.

WILLS.

CONTRACT TO DEVISE OR BEQUEATH.

Evidence: Sufficiency. Evidence reviewed and held sufficient to estab-
1 lish a contract "to will and bequeath real estate." *Daniels v. Butler*, 65.

CONSTRUCTION.

Life estate or fee. The following will grants to the wife, she remain-
2 ing unmarried, a life estate only: "I do give and bequeath to my
wife . . . the entire residue (after payment of my debts) of
my property, personal and real, . . . to have and to hold in
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**WITNESSES Continued
EXAMINATION.**

TO

WORK AND LABOR

Refreshing memory from memoranda. A witness may refresh his
4 memory, in an action on account, by referring to his book of
"original entries," though the entries were not made by him, but
under his direction and when made he knew them to be correct.
For the same purpose he may refer to a slip or list made from
the book of original entries for convenience, he having verified
the correctness of the slip. *Phoenix, etc., v. Sinclair*, 564.

CROSS-EXAMINATION.

Undue limitation. Where the witness claimed he was working all the
5 time for a certain brewing company in the delivery of liquors
to plaintiff for defendant and was indefinite in his statements as
to the amount delivered, *held*, the defendant should have been
permitted, on cross-examination, to show that during said time
the witness was dealing with other liquor houses and delivering
their liquors to plaintiff. But *held* not reversible error to refuse
such right. *Cvitanovich v. Bromberg*, 736.

IMPEACHMENT.

Inconsistent statements: Witness confined to limits of question. As
6 preparatory to impeaching a witness by showing that certain
statements denied by the witness were made, a foundation question
should be put to the witness, in which question should be
embraced the matters on which it is intended to base the impeachment.
Substantially the same matters should be carried over
into the question put to the impeaching witness, and the witness
should be confined thereto and not permitted to wander away into
other matters. *Bisgaard v. Duvall*, 711.

WORDS AND PHRASES.

"Funeral expense." In re *Estate of Lester*, 15.

WORK AND LABOR.**IMPLIED AGREEMENT.**

Father and son. Where a son had the unrestricted control and man-
1 agement of the father's property and collected and converted the
entire income thereof to his own use, the implication arises that
the son was working for himself and not for the father. *Bettinger v. Bettinger*, 40.

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[illegible]

